16B C.J.S. Constitutional Law § 1100

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Constitutional Law
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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

13. Candidates and Elections

a. In General

§ 1100. General right of protected speech for political candidates

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1680

The First Amendment guaranty of free speech has its fullest and most urgent application to speech uttered during a campaign for political office, affording the broadest protection to core political expression.

The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office,[1] characterized as core political expression,[2] requiring the most exacting strict scrutiny and compelling government interests to sustain any law or regulation that burdens core political speech.[3] Political speech is the primary object of First Amendment protection and the lifeblood of a self-governing people.[4] The discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by the Constitution, and the First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.[5] It is not the function of government to select which issues are worth discussing or debating in the course of a political campaign.[6]

The First Amendment protects political campaign speech despite popular opposition.[7] Debate on the qualifications of candidates is at the core of the electoral process and of the First Amendment freedoms.[8]

CUMULATIVE SUPPLEMENT

Cases:

When a private entity decides to host political speech, its First Amendment protections are at their apex. U.S. Const. Amend. 1. Washington Post v. McManus, 944 F.3d 506 (4th Cir. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—McCutcheon v. Federal Election Com'n, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014); Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011); Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

2 U.S.—Republican Party of Minnesota v. White, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002); McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995); Pest Committee v. Miller, 626 F.3d 1097 (9th Cir. 2010).

3 § 1101.

4 U.S.—McCutcheon v. Federal Election Com'n, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014).

5 U.S.—McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995).

6 U.S.—Republican Party of Minnesota v. White, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002).

7 U.S.—McCutcheon v. Federal Election Com'n, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014).

8 U.S.—Republican Party of Minnesota v. White, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

13. Candidates and Elections

a. In General

§ 1101. Standard for limitation or restriction of political speech

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1680, 1681

The First Amendment guaranty of free speech, as applied in the context of political elections, candidates, and political speech, requires the most exacting strict scrutiny, compelling government interests, and narrow tailoring to achieve those interests in order to sustain a burdensome or restrictive law or regulation.

The First Amendment guaranty of free speech, as applied in the context of political elections, candidates, and political speech, requires the most exacting strict scrutiny and compelling government interests to sustain any burdensome or restrictive law or regulation.[1] Under the strict-scrutiny test, the party defending a content-based restriction of speech by candidates for public office has the burden to prove that the restriction is (1) narrowly tailored, to serve (2) a compelling state interest.[2]

Under strict scrutiny of a statute regulating political speech in the context of elections, a narrowly tailored regulation is one that is necessary and actually advances the state's interest, is not over-inclusive in sweeping too broadly, is not under-inclusive in leaving significant influences bearing on the interest unregulated, and is the least-restrictive alternative in that it could be not replaced by another regulation that could advance the interest as well with less infringement of speech.[3]

CUMULATIVE SUPPLEMENT

Cases:

Ohio's political false-statements laws were not narrowly tailored to protect integrity of state's elections, specifically with respect to their application to commercial intermediaries, and thus these laws did not survive strict scrutiny on First Amendment challenge, where these laws created broad prohibition that applied to anyone who advertised, posted, published, circulated, distributed, or otherwise disseminated false political speech, and thus were not limited to speakers of false statements. U.S.C.A. Const.Amend. 1; Ohio R.C. § 3517.21(B)(9, 10). Susan B. Anthony List v. Driehaus, 814 F.3d 466 (6th Cir. 2016).

Ohio's political false-statements laws were subject to strict scrutiny under Supreme Court's *Reed v. Town of Gilbert* decision, which sought to clarify level of review due to certain speech prohibitions, since these laws only governed speech about political candidates during election, and thus were content-based restrictions focused on specific subject matter. U.S.C.A. Const.Amend. 1; Ohio R.C. § 3517.21(B)(9, 10). Susan B. Anthony List v. Driehaus, 814 F.3d 466 (6th Cir. 2016).

In order to satisfy strict scrutiny for a First Amendment violation, a regulation of speech must be narrowly tailored to serve a compelling interest. U.S.C.A. Const.Amend. 1. O'Toole v. O'Connor, 802 F.3d 783 (6th Cir. 2015).

While protecting children is a compelling government interest, for purpose of analyzing a First Amendment challenge to a law restricting speech, under the strict scrutiny standard, speech cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. U.S. Const. Amend. 1. Otto v. City of Boca Raton, Florida, 981 F.3d 854 (11th Cir. 2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011); Republican Party of Minnesota v. White, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002).
Unnecessary abridgement cannot survive rigorous review
U.S—McCutcheon v. Federal Election Com'n, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014).

2 U.S.—Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011); Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010); Republican Party of Minnesota v. White, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002).

3 U.S.—281 Care Committee v. Arneson, 766 F.3d 774 (8th Cir. 2014), cert. denied, 135 S. Ct. 1550 (2015).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

13. Candidates and Elections

a. In General

§ 1102. First Amendment protection of speech of judicial candidates

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2054 to 2056

The First Amendment guaranty of free speech extends to candidates for judicial offices, subjecting limits or restrictions to a test of strict scrutiny for a compelling government interest and narrow tailoring to achieve those interests.

The First Amendment guaranty of free speech extends to candidates for judicial offices, subjecting limits or restrictions to a test of strict scrutiny for a compelling government interest and narrow tailoring to achieve those interests.[1] A state's power to dispense with elections of judges altogether does not include the lesser power to conduct judicial elections under conditions of state-imposed voter ignorance by restricting the speech of judicial candidates; if the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process the First Amendment rights that attach to their roles.[2] Along with knowing a judicial candidate's views on legal or political issues, voters have a right to know how political their potential judge might be, and to the extent states wish to avoid a politicized judiciary, they can choose to do so by not electing judges rather than restricting political speech by judicial candidates.[3]

While states have a compelling interest in the appearance and actuality of judicial impartiality,[4] they do not have a compelling interest in preventing judicial candidates from announcing views on legal or political issues.[5]

The State's interests do not support per se regulation of the speech of judicial candidates in personally soliciting or accepting campaign contributions, or making speeches for, fund raising for, or endorsing or opposing, other candidates.[6] Other authorities, however, uphold certain political activity restrictions of state judicial conduct codes, including prohibitions against a judicial candidate making commitments that would be inconsistent with the impartial performance of judicial office, acting as a leader or holding an office in a political organization or making speeches on behalf of a political organization, personally soliciting or accepting campaign contributions,[7] or soliciting funds for political organizations or candidates and endorsing other candidates.[8]

A judicial conduct regulation is overbroad and not sufficiently tailored to preserving integrity, impartiality, and independence of the judiciary when it prohibits false statements negligently made and true statements that are misleading or deceptive or contain a material misrepresentation or omit a material fact or create an unjustified expectation about results.[9]

A provision of a judicial code of conduct stating that a judge must resign to run for any elective office rests on a rational predicate and does not violate the guarantees of freedom of speech in the state and federal constitutions when the provision rationally seeks to separate a judge's political, legislative, or executive branch ambitions from the judge's judicial decision-making to further the objective of maintaining a judiciary that is independent and impartial both in fact and in the public's perception.[10]

CUMULATIVE SUPPLEMENT

Cases:

Provisions of Arizona Code of Judicial Conduct prohibiting judicial candidates from personally soliciting funds for another candidate or political organization, publicly endorsing another candidate for public office, making speeches on behalf of another candidate or political organization, or actively taking part in any political campaign were narrowly tailored to achieve state's compelling interest in upholding public confidence in judiciary, and thus did not violate candidate's free speech rights, even though state could have prohibited more types of endorsements or campaign participation, provisions banned involvement with ballot measures and endorsement of candidates who were highly unlikely to appear before judge, and recusal was available in individual cases; state squarely aimed at preventing conduct that could erode judiciary's credibility, provisions did not prevent judicial candidates from announcing their views on disputed legal and political subjects, and recusal would cause insurmountable burden in some jurisdictions and could cause erosion of public confidence in judiciary. U.S.C.A. Const.Amend. 1; 17A A.R.S. Sup.Ct.Rules, Rule 81, Code of Jud.Conduct, Rule 4.1(A)(2–5). Wolfson v. Concannon, 811 F.3d 1176 (9th Cir. 2016).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Republican Party of Minnesota v. White, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002); Carey v. Wolnitzek, 614 F.3d 189 (6th Cir. 2010); Siefert v. Alexander, 608 F.3d 974 (7th Cir. 2010); Wolfson v. Concannon, 750 F.3d 1145 (9th Cir. 2014).

2 U.S.—Republican Party of Minnesota v. White, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002).

3 U.S.—Wolfson v. Concannon, 750 F.3d 1145 (9th Cir. 2014).

4 U.S.—Carey v. Wolnitzek, 614 F.3d 189 (6th Cir. 2010); Wersal v. Sexton, 674 F.3d 1010 (8th Cir. 2012); Wolfson v. Concannon, 750 F.3d 1145 (9th Cir. 2014).

5 U.S.—Republican Party of Minnesota v. White, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002); Siefert v. Alexander, 608 F.3d 974 (7th Cir. 2010).

6 U.S.—Republican Party of Minnesota v. White, 416 F.3d 738 (8th Cir. 2005); Wolfson v. Concannon, 750 F.3d 1145 (9th Cir. 2014).

Invalid regulation of public statements

U.S.—Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002).

Invalid ban on endorsements

U.S.—Sanders County Republican Cent. Committee v. Bullock, 698 F.3d 741 (9th Cir. 2012).

Invalid ban on party affiliation

U.S.—Siefert v. Alexander, 608 F.3d 974 (7th Cir. 2010).

Invalid ban on solicitations

U.S.—Carey v. Wolnitzek, 614 F.3d 189 (6th Cir. 2010).

7 U.S.—Bauer v. Shepard, 620 F.3d 704 (7th Cir. 2010).

8 U.S.—Wersal v. Sexton, 674 F.3d 1010 (8th Cir. 2012).

9 U.S.—Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002).

10 Me.—In re Dunleavy, 2003 ME 124, 838 A.2d 338 (Me. 2003).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

13. Candidates and Elections

b. Regulation of Particular Activities

§ 1103. First Amendment protection of distribution of campaign literature or information

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1684

The First Amendment guaranty of free speech generally prohibits limitations or restrictions on the distribution of political campaign literature or information.

The First Amendment guaranty of free speech prohibits limitations or restrictions on the distribution of political campaign literature or information, subjecting any such requirements to strict scrutiny for narrow tailoring to serve compelling state interests, thus rendering invalid any content-based restriction on the distribution of campaign literature that fails to meet the test.[1] Distributing campaign information in the advocacy of a politically controversial viewpoint is the essence of First Amendment expression, and no form of speech is entitled to greater constitutional protection.[2]

A state statute requiring advance notice before the distribution of political literature and advertising by political action committees is a content-based restriction subject to strict scrutiny and is invalid as not substantially related to nor narrowly tailored to serving the State's interests in promoting an informed electorate, protecting voters from confusion and

misinformation, or avoiding corruption in the political process.[3] A desire to deter last minute negative campaigning by those whom candidates for public office cannot control is not a legitimate state interest justifying such an advance notice requirement.[4]

A state's statutory prohibition against the distribution of anonymous campaign literature cannot be justified under the First Amendment as means of preventing the dissemination of untruths, when the statute contains no language limiting its application to fraudulent, false, or libelous statements, and the State's simple interest in providing voters with additional relevant information is not sufficient.[5] The anonymous distribution of political information is not a pernicious, fraudulent practice but is an honorable tradition of advocacy and of dissent; anonymity is a shield from the tyranny of the majority.[6] A state statute that requires groups or entities publishing material or information relating to an election candidate or ballot question to reveal on the publication the names and addresses of the publication's financial sponsors is a content-based limitation on core political speech that is invalid when less restrictive means are available to further the State's articulated interest in helping voters evaluate usefulness of information, preventing fraud, and enforcing campaign finance laws.[7]

Footnotes

1 U.S.—McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995); American Civil Liberties Union of Nevada v. Heller, 378 F.3d 979 (9th Cir. 2004); Arizona Right to Life Political Action Committee v. Bayless, 320 F.3d 1002 (9th Cir. 2003).

2 U.S.—McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995).

3 U.S.—Arizona Right to Life Political Action Committee v. Bayless, 320 F.3d 1002 (9th Cir. 2003).

4 U.S.—Arizona Right to Life Political Action Committee v. Bayless, 320 F.3d 1002 (9th Cir. 2003).

5 U.S.—McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995).

6 U.S.—McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995).

7 U.S.—American Civil Liberties Union of Nevada v. Heller, 378 F.3d 979 (9th Cir. 2004).
As to campaign contributions and expenditures, generally, see §§ 1107 to 1111.

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

13. Candidates and Elections

b. Regulation of Particular Activities

§ 1104. First Amendment protection for circulating or collecting petitions, initiatives, or referenda

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1683

The First Amendment's protection of speech includes the circulation of election petitions, initiative petitions, and ballot petitions.

The First Amendment's protection of speech includes the circulation of a ballot or initiative petition as involving a type of interactive communication concerning political change that is appropriately described as core political speech.[1] The First Amendment's protections are at a zenith as applied to such core political speech, requiring the application of exacting scrutiny for compelling state interests and narrowly tailored restrictions.[2] In the context of election petition solicitation and collection, the standard requires a substantial relation between the requirement and a sufficiently important governmental interest, and the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.[3] That standard necessarily defeats a law requiring the disclosure of the names of petition signers,[4] a requirement that circulators be registered

voters,[5] a requirement that circulators be local residents,[6] a witness residency requirement,[7] a bar to receiving payment for the collection of election-related petitions,[8] or a ban on payment for any other than a time-worked basis.[9]

The right to free speech is not implicated by a state's creation of a content-neutral ballot initiative and referendum procedure, reviewed particularly as to the state's single-subject and description-of-effect provisions, but is implicated only by the state's attempts to regulate speech associated with an initiative procedure; the statute is not subject to strict scrutiny in the absence of a direct effect on or involvement of one-on-one communications with voters.[10]

The right of access to private property for purpose of soliciting and collecting petition signatures depends on the status of the property under a forum analysis, and the absence of a public forum permits denying access.[11]

Voter registration canvassing.

The minimal burden placed on First Amendment rights by a statute prohibiting the compensation of voter registration canvassers based on the total number of registered voters was reasonable in light of the State's interest in preventing voter registration fraud.[12]

CUMULATIVE SUPPLEMENT

Cases:

Ohio's municipal ballot initiative laws, which allowed a county board of elections to review proposed initiatives prior to the election, were not a prior restraint of speech, as would require heightened procedural safeguards in order to survive a First Amendment challenge; laws did not directly restrict core expressive conduct and instead regulated the process by which initiative legislation was put before the electorate, thereby having, at most, a second-order effect on protected speech. U.S. Const. Amend. 1; Ohio Const. art. 2, § 1f; Ohio Rev. Code Ann. §§ 3501.11(K), 3501.38(M)(1)(a), 3501.39(A)(3). Schmitt v. LaRose, 933 F.3d 628 (6th Cir. 2019).

State constitutional provision outlining in-person procedure for collecting and verifying initiative petition signatures did not prevent political action committees (PAC) from engaging in core political speech with potential signers during COVID-19 pandemic, and thus did not violate First Amendment free speech clause as applied, even though PACs sought to use online signature gathering system; provision was reasonable, nondiscriminatory ballot access law that did not limit PACs' available pool of circulators, signature verification requirement did not restrict means that PACs could use to advocate proposals, it was COVID-19, not provision, that restricted circulators' ability to communicate with potential signers, and requirement of in-person signatures increased in-person communication. U.S. Const. Amend. 1; Ariz. Const. art. 4, part 1, § 1(9). Arizonans for Second Chances, Rehabilitation, and Public Safety v. Hobbs, 471 P.3d 607 (Ariz. 2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Meyer v. Grant, 486 U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988); Nader v. Blackwell, 545 F.3d 459 (6th Cir. 2008); Libertarian Party of Virginia v. Judd, 881 F. Supp. 2d 719 (E.D. Va. 2012), aff'd, 718 F.3d 308 (4th Cir. 2013), cert. denied, 134 S. Ct. 681, 187 L. Ed. 2d 549 (2013).

2 U.S.—Meyer v. Grant, 486 U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988); Citizens in Charge v. Gale, 810 F. Supp. 2d 916 (D. Neb. 2011).

3 U.S.—Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011).

4 U.S.—Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011).

5 U.S.—Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999); Nader v. Blackwell, 545 F.3d 459 (6th Cir. 2008); Bogaert v. Land, 675 F. Supp. 2d 742 (W.D. Mich. 2009).

6 U.S.—Nader v. Blackwell, 545 F.3d 459 (6th Cir. 2008); Chandler v. City of Arvada, Colorado, 292 F.3d 1236, 13 A.L.R.6th 861 (10th Cir. 2002); Citizens in Charge v. Gale, 810 F. Supp. 2d 916 (D. Neb. 2011); Libertarian Party of Virginia v. Judd, 881 F. Supp. 2d 719 (E.D. Va. 2012), aff'd, 718 F.3d 308 (4th Cir. 2013), cert. denied, 134 S. Ct. 681, 187 L. Ed. 2d 549 (2013).

7 U.S.—Lerman v. Board of Elections in City of New York, 232 F.3d 135 (2d Cir. 2000); Libertarian Party of Virginia v. Judd, 718 F.3d 308 (4th Cir. 2013), cert. denied, 134 S. Ct. 681, 187 L. Ed. 2d 549 (2013).

8 U.S.—Meyer v. Grant, 486 U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988).

9 U.S.—Citizens for Tax Reform v. Deters, 518 F.3d 375, 40 A.L.R.6th 693 (6th Cir. 2008).

Ban on signature payment basis invalid

U.S.—Independence Institute v. Gessler, 936 F. Supp. 2d 1256 (D. Colo. 2013).

Ban on signature payment basis upheld

U.S.—Prete v. Bradbury, 438 F.3d 949 (9th Cir. 2006).

10 U.S.—Pest Committee v. Miller, 626 F.3d 1097 (9th Cir. 2010).

11 U.S.—Riemers v. Super Target of Grand Forks, Target Corp., 363 F. Supp. 2d 1182 (D.N.D. 2005).

12 U.S.—Busefink v. State, 286 P.3d 599, 128 Nev. Adv. Op. No. 49 (Nev. 2012).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

13. Candidates and Elections

b. Regulation of Particular Activities

§ 1105. First Amendment protection of conduct at polling places; access to polling places

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1692

The First Amendment guaranty of free speech and press applies to the restriction or regulation of speech or expressive conduct at, or access to, the polling or voting location.

The First Amendment guaranty of free speech applies to the restriction or regulation of speech or expressive conduct at the polling or voting location,[1] but a state has a compelling interest in preventing voter intimidation and election fraud at the polling place, and maintaining peace, order, and decorum in a polling place.[2] For the purpose of determining the applicable constitutional standard, a polling place is generally considered a nonpublic forum[3] in which restrictions do not require strict scrutiny provided they are viewpoint neutral, reasonable in light of the purpose which the forum serves, and narrowly tailored to serve the state's legitimate interests.[4] Reasonable restrictions may validly take the form of prohibitions against electioneering or campaigning, vote solicitation, or the display of campaign materials within a designated distance from the polling place.[5] Prohibiting voters from wearing campaign paraphernalia into the polling place in order to cast their ballots does not run afoul of the First Amendment so long as the prohibition is reasonable and viewpoint neutral.[6]

Exit polling is protected speech under the First Amendment and a statutory ban on exit polling within certain distances of the polling place must be reasonable and narrowly tailored to the State's interests.[7]

Press access.

The applicability of the First Amendment right of free press in relation to polling places is subject to an "experience and logic" analysis for the right of press access to government proceedings; it requires a strict scrutiny standard for restrictions only if a right of access exists under that test and no such right of access is recognized for electoral polling places, as nonpublic forums, thus requiring only a reasonableness analysis under the First Amendment and permitting the exclusion of the press from polling places.[8]

Footnotes

1 U.S.—Anderson v. Spear, 356 F.3d 651, 2004 FED App. 0025P (6th Cir. 2004); Minnesota Majority v. Mansky, 708 F.3d 1051 (8th Cir. 2013), cert. denied, 134 S. Ct. 824 (2013).

2 U.S.—Minnesota Majority v. Mansky, 708 F.3d 1051 (8th Cir. 2013), cert. denied, 134 S. Ct. 824 (2013).

3 U.S.—PG Pub. Co. v. Aichele, 705 F.3d 91 (3d Cir. 2013), cert. denied, 133 S. Ct. 2771, 186 L. Ed. 2d 219 (2013); Minnesota Majority v. Mansky, 708 F.3d 1051 (8th Cir. 2013), cert. denied, 134 S. Ct. 824 (2013).

4 U.S.—PG Pub. Co. v. Aichele, 705 F.3d 91 (3d Cir. 2013), cert. denied, 133 S. Ct. 2771, 186 L. Ed. 2d 219 (2013); Minnesota Majority v. Mansky, 708 F.3d 1051 (8th Cir. 2013), cert. denied, 134 S. Ct. 824 (2013); Citizens for Police Accountability Political Committee v. Browning, 572 F.3d 1213, 65 A.L.R.6th 787 (11th Cir. 2009).

5 U.S.—Minnesota Majority v. Mansky, 708 F.3d 1051 (8th Cir. 2013), cert. denied, 134 S. Ct. 824 (2013).
No Approach Zone of 100 feet
U.S.—Citizens for Police Accountability Political Committee v. Browning, 572 F.3d 1213, 65 A.L.R.6th 787 (11th Cir. 2009).
500 foot restriction overbroad
U.S.—Anderson v. Spear, 356 F.3d 651, 2004 FED App. 0025P (6th Cir. 2004).
300 foot restriction overbroad
U.S.—Russell v. Grimes, 53 F. Supp. 3d 1004 (E.D. Ky. 2014).

6 U.S.—American Federation of State, County and Mun. Employees, Council 25 v. Land, 583 F. Supp. 2d 840 (E.D. Mich. 2008).

7 U.S.—Daily Herald Co. v. Munro, 838 F.2d 380 (9th Cir. 1988); CBS Broadcasting, Inc. v. Cobb, 470 F. Supp. 2d 1365 (S.D. Fla. 2006); American Broadcasting Companies, Inc. v. Wells, 669 F. Supp. 2d 483 (D.N.J. 2009).

8 U.S.—PG Pub. Co. v. Aichele, 705 F.3d 91 (3d Cir. 2013), cert. denied, 133 S. Ct. 2771, 186 L. Ed. 2d 219 (2013).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

13. Candidates and Elections

b. Regulation of Particular Activities

§ 1106. First Amendment protection of ballot access

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1688

The First Amendment guaranty of free speech applies to questions of ballot access by candidates or initiatives.

The State's regulation of who can appear on a ballot inevitably affects free speech protected by the First Amendment.[1] The standard of review applicable to voting regulations on ballot access or candidate qualification—whether strict scrutiny or a lesser standard—depends on the character of the regulation and the magnitude of the asserted injury to protected rights.[2] A regulation imposes a severe speech restriction, requiring strict scrutiny, if it significantly impairs access to the ballot, stifles core political speech or dictates electoral outcomes.[3] Restrictions that impose only a lesser burden on those rights are sustainable if reasonably related to the State's important regulatory interest since there is no fundamental right to run for office or to use the ballot to send a particular message.[4] A regulation imposes a slight and permissible restriction on speech when it is generally applicable, evenhanded, and politically neutral, or if it protects the reliability and integrity of the election process.[5]

Age requirements, like residency requirements, and term limits, are neutral candidacy qualifications which the State has the right to impose, without violating the First Amendment.[6] Ballot access or candidacy petition deadlines and sufficiency requirements are sustainable in the absence of a severe burden on First Amendment rights.[7]

A political party may require a party-nominee loyalty oath for placement on the party's primary ballot since the nature of the message is not compelled because the candidate may choose to say nothing or repudiate oath at the risk of losing party members' support.[8]

Write-in voting.

A state's prohibition on write-in voting is justified when there is ease of access to the State's ballots.[9]

Primary endorsement by political party.

A state's ban on primary endorsements by political parties constitutes a violation of the First Amendment right to free speech.[10]

Footnotes

1 U.S.—Pisano v. Strach, 743 F.3d 927 (4th Cir. 2014); Lindsay v. Bowen, 750 F.3d 1061 (9th Cir. 2014).

2 U.S.—Libertarian Party of Ohio v. Blackwell, 462 F.3d 579, 2006 FED App. 0342P (6th Cir. 2006).

3 U.S.—Chamness v. Bowen, 722 F.3d 1110 (9th Cir. 2013).

4 U.S.—Lindsay v. Bowen, 750 F.3d 1061 (9th Cir. 2014).

5 U.S.—Chamness v. Bowen, 722 F.3d 1110 (9th Cir. 2013).

6 U.S.—Lindsay v. Bowen, 750 F.3d 1061 (9th Cir. 2014).

7 U.S.—Pisano v. Strach, 743 F.3d 927 (4th Cir. 2014).

8 U.S.—Kucinich v. Texas Democratic Party, 563 F.3d 161 (5th Cir. 2009).

9 U.S.—Burdick v. Takushi, 937 F.2d 415 (9th Cir. 1991), judgment aff'd, 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992).

10 U.S.—Eu v. San Francisco County Democratic Cent. Committee, 489 U.S. 214, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

13. Candidates and Elections

c. Contributions and Expenditures

§ 1107. General protection of First Amendment to political contributions and expenditures

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1695, 1698 to 1708

Financial contributions or expenditures for a political candidate or political campaign are protected political speech under the First Amendment guaranty of free speech.

Financial contributions[1] or expenditures for a political candidate or political campaign are protected political speech under the First Amendment guaranty of free speech.[2] Limits on political expenditures and political contributions receive different levels of constitutional scrutiny.[3] Any restriction on political expenditures must meet a standard of strict scrutiny for service of a compelling government interest and narrow tailoring to achieve that interest.[4] Restrictions on political contributions are subject to the less rigorous standard of exacting scrutiny review requiring a sufficiently important government interest and the employment of means closely drawn to avoid unnecessary abridgement of First Amendment rights.[5]

The one recognized legitimate government interest for restricting campaign finances is the prevention of corruption or the appearance of corruption, and the only type of corruption that the government may target is quid pro quo corruption.[6] For this

purpose, targeting "quid pro quo corruption" or its appearance goes to the notion of a direct exchange of an official act for money.[7]

The leveling of electoral opportunities for candidates of different personal wealth is not a legitimate government objective and cannot be used to justify a substantial burden on the First Amendment right of free speech.[8]

Footnotes

1 U.S.—McCutcheon v. Federal Election Com'n, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014).

2 U.S.—Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011); Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

A.L.R. Library

Constitutional Validity of State or Local Regulation of Contributions by or to Political Action Committees, 24 A.L.R.6th 179.

Validity, Construction, and Application of 2 U.S.C.A. s 441b and Predecessor Statute (18 U.S.C.A. s 610), Prohibiting Certain Entities from Making Contributions or Expenditures in Connection with Federal Elections, 190 A.L.R. Fed. 169.

3 U.S.—McCutcheon v. Federal Election Com'n, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014); Stop This Insanity Inc. Employee Leadership Fund v. Federal Election Com'n, 761 F.3d 10 (D.C. Cir. 2014).

4 § 1108.

5 § 1109.

6 U.S.—McCutcheon v. Federal Election Com'n, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014).

7 U.S.—McCutcheon v. Federal Election Com'n, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014).

8 U.S.—Davis v. Federal Election Com'n, 554 U.S. 724, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

13. Candidates and Elections

c. Contributions and Expenditures

§ 1108. Restrictions of expenditure by or for political candidate or political campaign

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1695, 1703 to 1708

Restrictions on financial expenditures for or by a political candidate or political campaign reduce the quantity of protected expression under the First Amendment guaranty of free speech and are subject to strict constitutional scrutiny for a compelling government interest and narrow tailoring to achieve that interest.

Any restriction on political expenditures must meet a standard of strict scrutiny for service of a compelling government interest and narrow tailoring to achieve that interest,[1] which is a higher standard than required of restrictions on political contributions,[2] since expenditures for political speech are core political speech directly advancing public debate.[3] Strict scrutiny applies regardless whether the restriction targets individual spending or candidate spending.[4] Restrictions on the amount of money a person or group can spend on political communication during a campaign necessarily reduce the quantity of expression, implicating the First Amendment.[5] Expenditure limits are a direct restraint on an individual's ability to express a position[6] and are substantial rather than merely theoretical restraints on the quantity and diversity of political speech.[7]

A state matching funds restriction unconstitutionally imposed a substantial burden on political speech by triggering direct payments of public money to publicly financed opponents based on a candidate's expenditure of personal funds since the statute did not further the State's compelling interest in combatting political corruption; a candidate's use of personal funds reduces risks of corruption and independent expenditures do not give rise to quid pro quo corruption.[8]

The Bipartisan Campaign Reform Act of 2002 (BCRA) provision, generally prohibiting federal officeholders and candidates from soliciting, receiving, directing, transferring, or spending unregulated "soft money" in connection with any local, state, or federal election, did not violate the free speech rights of officeholders or candidates since the ban was closely drawn to address governmental interest in preventing actual or apparent corruption of federal candidates and officeholders.[9] A "hard money" expenditure requirement imposed on nonprofit organizations, limiting the use of "soft money" campaign expenditures, is not valid when insufficiently narrow in its service of anticorruption objectives, as the requirement may apply, at most, to the use of a percentage of administrative expenses that closely corresponds to the percentage of activities relating to its contributions as compared to its advertisements, get-out-the-vote efforts, and voter registration activities.[10]

The State's interest in regulating gambling is not furthered by restricting the use of gambling proceeds by nonprofit organizations for electoral purposes.[11]

CUMULATIVE SUPPLEMENT

Cases:

Matching funds provision of Arizona Citizens Clean Elections Act, pursuant to which, after privately-financed candidate has raised or spent threshold amount, each dollar spent by privately-financed candidate triggered direct payment of public money of almost one additional dollar to publicly-financed opponents, imposed substantial burden on political speech, and thus, strict scrutiny test applied to determine if provision violated First Amendment; provision forced privately-financed candidates and independent expenditure groups to shoulder special and significant burden when choosing to exercise right to spend funds on behalf of privately-financed candidacy, as it would trigger automatic release of public funds to all publicly-financed opponents, and even if privately-financed candidate opted to spend less, any spending by independent expenditure groups to promote privately-financed candidate would trigger release of matching funds directly to publicly-financed opponents to spend as they saw fit, and to avoid triggering matching funds, independent expenditure groups could only opt to change their message to address issue, rather than candidate, or completely refrain from spending. U.S.C.A. Const.Amend. 1; A.R.S. § 16-952(A), (B), (C)(4, 5). Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011); Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010); Vermont Right to Life Committee, Inc. v. Sorrell, 758 F.3d 118 (2d Cir. 2014).

2 § 1109.

3 U.S.—Republican Party of New Mexico v. King, 741 F.3d 1089 (10th Cir. 2013).

4 U.S.—Wisconsin Right to Life State Political Action Committee v. Barland, 664 F.3d 139 (7th Cir. 2011).

5 U.S.—Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011).

6 Colo.—Dallman v. Ritter, 225 P.3d 610 (Colo. 2010).

7 U.S. v. Danielczyk, 683 F.3d 611 (4th Cir. 2012), cert. denied, 133 S. Ct. 1459, 185 L. Ed. 2d 362 (2013).

8 U.S.—Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011).

9 U.S.—McConnell v. Federal Election Com'n, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003) (overruled on other grounds by, Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010)).

10 U.S.—Emily's List v. Federal Election Com'n, 581 F.3d 1 (D.C. Cir. 2009).

11 U.S.—Department of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Com'n, 760 F.3d 427 (5th Cir. 2014).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

13. Candidates and Elections

c. Contributions and Expenditures

§ 1109. Restrictions on contribution by or for political candidate or political campaign

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1695, 1698, 1699

Restrictions on financial contributions to or for a political candidate or political campaign affect protected expression under the First Amendment guaranty of free speech and are subject to exacting scrutiny review for a sufficiently important government interest and the employment of means closely drawn to avoid unnecessary abridgement of First Amendment rights.

Restrictions on political contributions are subject to a less rigorous standard of review than restrictions on political expenditures,[1] requiring exacting scrutiny review for a sufficiently important government interest and the employment of means closely drawn to avoid unnecessary abridgement of First Amendment rights,[2] since contributions lie closer to the edges than to the core of political expression,[3] and restrictions impose only indirect constraints on free speech.[4]

Statutory aggregate limits on how much money a donor may contribute in total to all political candidates or committees violate the First Amendment, since the aggregate limits do little, if anything, to serve the objective of combatting corruption through the circumvention of the base limits, and seriously restrict participation in the democratic process.[5]

The leveling of electoral opportunities for candidates of different personal wealth is not a legitimate government objective justifying a "Millionaires' Amendment" to the Bipartisan Campaign Reform Act (BCRA), relaxing limits on the ability of an opponent of a self-financed House of Representatives candidate to raise money from donors and to coordinate campaign spending with party committees; the Amendment effectively penalizes the self-financed candidate's ability to use personal funds to finance campaign speech and produces fundraising advantages for opponents without any compelling state interest.[6]

The state's interest in preventing election corruption is strongest when the state limits contributions made directly to political candidates.[7] A donor to an independent expenditure committee is removed from political candidates and may not be deprived of the First Amendment right to political speech by limiting the donor's ability to contribute to the committees; the threat of quid pro quo corruption does not arise when individuals make contributions to groups that engage in independent spending on political speech.[8]

A contribution ban may apply to direct contributions from registered lobbyists, given the traditional susceptibility of lobbyists to corruption or the appearance of corruption, when the ban does not prohibit other political activities by lobbyists.[9] A ban on contributions by state contractors, lobbyists, and associated individuals failed scrutiny as insufficiently tailored,[10] but a limit on contributions to municipal candidates by individuals and entities doing business with the city is valid when reasonably tailored.[11]

Limitations may validly apply to a candidate's personal expenditures when the candidate voluntarily seeks and accepts public financing and chooses to limit the amount of personal expenditures.[12]

CUMULATIVE SUPPLEMENT

Cases:

Substantial burden on political speech imposed by matching funds provision of Arizona Citizens Clean Elections Act, pursuant to which, after privately-financed candidate has raised or spent threshold amount, each dollar spent by privately-financed candidate triggered direct payment of public money of almost one additional dollar to publicly-financed opponents, did not further state's compelling interest in combatting political corruption, and thus, provision violated First Amendment; candidate's use of personal funds generally reduced risks of corruption, independent expenditures did not give rise to quid pro quo corruption, as such political messages were not coordinated with candidates, and state's strict contribution limits and fundraising disclosure requirements already deterred political corruption. U.S.C.A. Const.Amend. 1; A.R.S. § 16-952. Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011).

To state a discrimination claim under the Fourteenth Amendment Equal Protection Clause or § 1981, plaintiffs must sufficiently allege that defendants acted with discriminatory intent. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1981. Burgis v. New York City Dept. of Sanitation, 798 F.3d 63 (2d Cir. 2015).

Campaign ethics statute prohibiting legislators from accepting gifts from lobbyists was content neutral, for purposes of candidates' claim that gift ban violated their First Amendment right to free speech, although gift ban targeted gifts based on identity of giver, where state's intent was to protect integrity of legislative process and avoid reality or appearance that state legislation was being bought and sold, and ban applied whether gifts conveyed any message at all. U.S. Const. Amend. 1; KRS 6.751(2). Schickel v. Dilger, 925 F.3d 858 (6th Cir. 2019).

In the context of political candidate contribution limits, it makes no difference whether a challenge to the disparate treatment of speakers or speech is framed under the First Amendment or the Equal Protection Clause. U.S. Const. Amends. 1, 14. Proft v. Raoul, 944 F.3d 686 (7th Cir. 2019).

[END OF SUPPLEMENT]

Footnotes

1 § 1108.

2 U.S.—McCutcheon v. Federal Election Com'n, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014); New York Progress and Protection PAC v. Walsh, 733 F.3d 483 (2d Cir. 2013); Preston v. Leake, 660 F.3d 726 (4th Cir. 2011); Wisconsin Right to Life State Political Action Committee v. Barland, 664 F.3d 139 (7th Cir. 2011); Republican Party of New Mexico v. King, 741 F.3d 1089 (10th Cir. 2013).

3 U.S.—Lodge No. 5 of Fraternal Order of Police ex rel. McNesby v. City of Philadelphia, 763 F.3d 358 (3d Cir. 2014); Iowa Right To Life Committee, Inc. v. Tooker, 717 F.3d 576 (8th Cir. 2013), cert. denied, 134 S. Ct. 1787, 188 L. Ed. 2d 757 (2014).

4 U.S.—Ognibene v. Parkes, 671 F.3d 174 (2d Cir. 2011).

5 U.S.—McCutcheon v. Federal Election Com'n, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014).

6 U.S.—Davis v. Federal Election Com'n, 554 U.S. 724, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008).

7 U.S.—Preston v. Leake, 660 F.3d 726 (4th Cir. 2011).

8 U.S.—New York Progress and Protection PAC v. Walsh, 733 F.3d 483 (2d Cir. 2013).

9 U.S.—Preston v. Leake, 660 F.3d 726 (4th Cir. 2011).

10 U.S.—Green Party of Connecticut v. Garfield, 616 F.3d 189 (2d Cir. 2010).

11 U.S.—Ognibene v. Parkes, 671 F.3d 174 (2d Cir. 2011).

12 N.M.—Montoya v. Herrera, 2012-NMSC-011, 276 P.3d 952 (N.M. 2012).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

13. Candidates and Elections

c. Contributions and Expenditures

§ 1110. Requirements for reporting and disclosure campaign contributions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1701

Disclosure requirements for campaign contributions burden speech protected by the First Amendment and are subject to an exacting scrutiny standard in the electoral context, requiring a substantial relation between the disclosure requirement and a sufficiently important governmental interest.

Disclosure requirements for campaign contributions burden speech protected by the First Amendment[1] and are subject to an exacting scrutiny standard in the electoral context, requiring a substantial relation between the disclosure requirement and a sufficiently important governmental interest.[2] Disclosure requirements for campaign contributions do not impose a ceiling on speech and, for that reason, disclosure often represents a less restrictive alternative to flat bans on certain types or quantities of speech.[3]

To withstand exacting scrutiny in the electoral context, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.[4] There must be a relevant correlation or substantial relation between the legitimate governmental interest and the information required to be disclosed.[5]

Provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) requiring televised electioneering communications funded by anyone other than a candidate to include a disclaimer identifying the person or entity responsible for the content of the advertising, and requiring any person spending more than $10,000 on electioneering communications within a calendar year to file a disclosure statement with the Federal Election Commission (FEC), did not violate the First Amendment protection of political speech, as applied to a nonprofit corporation that wished to distribute on cable television, through video-on-demand, a film regarding a candidate seeking nomination as a political party's candidate in a presidential election, and that wished to run three advertisements for the film.[6]

Disclosure requirements under the "Millionaires' Amendment" of the Bipartisan Campaign Reform Act (BCRA), requiring a self-financed candidate for House of Representatives to disclose to an opponent the intent to spend more than $350,000 in personal funds on the campaign, and requiring subsequent disclosures, violates the First Amendment when the disclosure requirements are designed to implement the unconstitutional asymmetrical contribution limits provided for under the BCRA.[7]

CUMULATIVE SUPPLEMENT

Cases:

Missouri statute, part of state's campaign finance disclosure law, imposing 30-day formation deadline for campaign committees was not disclosure law, and thus was subject to strict scrutiny under First Amendment, even if statute on its face did not limit speech, and state in practice allowed late formation and enforced formation deadline by imposing only $1,000 fee, where formation of campaign committee was precondition for legally engaging in speech, statute prohibited formation within 30 days of election, even if individual or group was willing to register, report information, keep necessary records, and take organizational steps, and statute imposed criminal penalties for violations. U.S. Const. Amend. 1; Mo. Ann. Stat. § 130.011(8). Missourians for Fiscal Accountability v. Klahr, 892 F.3d 944 (8th Cir. 2018).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—McCutcheon v. Federal Election Com'n, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014); Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010); Protectmarriage.com-Yes on 8 v. Bowen, 752 F.3d 827 (9th Cir. 2014), cert. denied, 135 S. Ct. 1523 (2015).

2 U.S.—John Doe No. 1 v. Reed, 561 U.S. 186, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010); Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010); Davis v. Federal Election Com'n, 554 U.S. 724, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008); Free Speech v. Federal Election Com'n, 720 F.3d 788 (10th Cir. 2013), cert. denied, 134 S. Ct. 2288, 189 L. Ed. 2d 172 (2014).
Informational interest found insufficient
U.S.—Catholic Leadership Coalition of Texas v. Reisman, 764 F.3d 409 (5th Cir. 2014).
Substantial relationship found sufficient
U.S.—Human Life of Washington Inc. v. Brumsickle, 624 F.3d 990 (9th Cir. 2010).
Substantial relationship not found
U.S.—Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth, 556 F.3d 1021 (9th Cir. 2009).

3 U.S.—McCutcheon v. Federal Election Com'n, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014); Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010); Center for Individual Freedom v. Madigan, 697 F.3d 464 (7th Cir. 2012).

4 U.S.—John Doe No. 1 v. Reed, 561 U.S. 186, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010).

5 U.S.—Davis v. Federal Election Com'n, 554 U.S. 724, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008).

6 U.S.—Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

7 U.S.—Davis v. Federal Election Com'n, 554 U.S. 724, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008).

End of Document

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

13. Candidates and Elections

c. Contributions and Expenditures

§ 1111. Restrictions on corporate political expenditures or contributions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1700

The protected right under the First Amendment to make political contributions and expenditures applies to corporate entities and restrictions on the right are subject to strict scrutiny for compelling government interests and narrow tailoring.

The protected right under the First Amendment to make political contributions and expenditures applies to corporate entities and the government may not, under the First Amendment, bar independent corporate expenditures for electioneering communications, within the applicable standard of strict scrutiny for whether the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.[1] A state statute providing that a corporation may not make an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party violates First Amendment political speech rights.[2]

CUMULATIVE SUPPLEMENT

Cases:

Federal Election Commission provided rational basis for its decision not to investigate campaign finance law advocate's complaints that corporate entities committed violations of Federal Election Campaign Act's straw donor prohibition, and thus Commission's decision was not contrary to law; Commission concluded that applying straw donor prohibitions to corporate entities at issue would create due process concerns and risk chilling important political speech in disclosing entities as straw donors, because existing Commission regulations and precedent offered few helpful clues about how straw donor prohibition applied in real life to closely held corporations and corporate limited liability companies (LLC). U.S. Const. Amends. 1, 5; 52 U.S.C.A. §§ 30109(a)(5)(A), 30122. Campaign Legal Center v. Federal Election Commission, 312 F. Supp. 3d 153 (D.D.C. 2018).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—American Tradition Partnership, Inc. v. Bullock, 132 S. Ct. 2490, 183 L. Ed. 2d 448 (2012); Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).
Invalid ban on political contribution or disbursement
U.S.—Texans for Free Enterprise v. Texas Ethics Com'n, 732 F.3d 535 (5th Cir. 2013); Wisconsin Right To Life, Inc. v. Barland, 751 F.3d 804 (7th Cir. 2014).

2 U.S.—American Tradition Partnership, Inc. v. Bullock, 132 S. Ct. 2490, 183 L. Ed. 2d 448 (2012).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

14. National Defense and Security; Military Service or Registration

§ 1112. First Amendment restrictions during time of war, treason, insurrection, or sedition

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490, 1584, 1807, 1860, 1862, 1863

The First Amendment guaranty of free speech is subject to restraint in the interest of national security, during time of war, and to combat treason, insurrection, or sedition.

The First Amendment protects expressions in opposition to national foreign policy in wartime[1] but is subject to restraint to prohibit dealing with the enemy during a time of war.[2] When the nation is at war many things that might be said in peacetime are such a hindrance that their utterance will not be endured and no court could regard them as protected by any constitutional right.[3] However, the conduct of the military and its designated civilian surrogates during wartime is a matter of the highest public concern, and speech critical of those responsible for military operations is well within the constitutionally protected area of free discussion.[4] The actual malice standard offers broad protection for the media commentator who is critical of public officials or public figures responsible for war-related activities; such a commentator must simply maintain a standard of care such as to avoid knowing falsehood or reckless disregard of the truth.[5]

The First Amendment does not forbid the punishment of pure speech as sedition,[6] treason,[7] or incitement of violence.[8] The Espionage Act, making it an offense by words or acts to support and favor the cause of the enemy and oppose that of the United States, is not an unconstitutional abridgement of free speech.[9] The Subversive Activities Control Act is not offensive to free speech in requiring the registration of an organization operating to advance the objectives of world communism and bringing about the overthrow of the government by any available means, including force.[10]

A state statute defining penalties for treasonable or seditious words or acts as grounds violates the First Amendment as unconstitutionally vague when it is not sufficiently clear to inform persons what conduct or utterance is proscribed.[11] A state statute defining an offense as the attempt to incite insurrection, as applied to the solicitation of membership to a political party, unconstitutionally invaded the right of free speech as vague and overbroad.[12]

Footnotes

1 U.S.—Bond v. Floyd, 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235 (1966).

2 U.S.—Chandler v. U.S., 171 F.2d 921 (1st Cir. 1948).

3 U.S.—U.S. v. Pelley, 132 F.2d 170 (C.C.A. 7th Cir. 1942).

Radio broadcasts from Germany during war

U.S.—U.S. v. Burgman, 87 F. Supp. 568 (D. D.C. 1949), judgment aff'd, 188 F.2d 637 (D.C. Cir. 1951).

4 U.S.—CACI Premier Technology, Inc. v. Rhodes, 536 F.3d 280, 40 A.L.R.6th 649 (4th Cir. 2008).

5 U.S.—CACI Premier Technology, Inc. v. Rhodes, 536 F.3d 280, 40 A.L.R.6th 649 (4th Cir. 2008).

6 U.S.—U.S. v. Rahman, 189 F.3d 88, 52 Fed. R. Evid. Serv. 425 (2d Cir. 1999).

7 U.S.—Chandler v. U.S., 171 F.2d 921 (1st Cir. 1948); U.S. v. Patillo, 431 F.2d 293 (4th Cir. 1970), adhered to, 438 F.2d 13 (4th Cir. 1971) (rejected on other grounds by, U.S. v. Aman, 31 F.3d 550 (7th Cir. 1994)).

Broadcast speeches as treason

U.S.—U.S. v. Burgman, 87 F. Supp. 568 (D. D.C. 1949), judgment aff'd, 188 F.2d 637 (D.C. Cir. 1951).

State treason statute upheld

U.S.—Brown v. Clark, 274 F. Supp. 95 (E.D. La. 1967).

8 U.S.—Harisiades v. Shaughnessy, 342 U.S. 580, 72 S. Ct. 512, 96 L. Ed. 586 (1952).

9 U.S.—Lockhart v. U.S., 264 F. 14 (C.C.A. 6th Cir. 1920).

Seizure of nonviolation treason records impermissible

U.S.—Heidy v. U.S. Customs Service, 681 F. Supp. 1445 (C.D. Cal. 1988).

10 U.S.—Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 81 S. Ct. 1357, 6 L. Ed. 2d 625 (1961).

11 U.S.—Keyishian v. Board of Regents of University of State of N. Y., 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967).

Executive order on loyalty investigation invalid

U.S.—Ozonoff v. Berzak, 744 F.2d 224 (1st Cir. 1984).

Treason materials importation statute not overbroad

U.S.—Church of Scientology of California v. Simon, 460 F. Supp. 56 (C.D. Cal. 1978), judgment aff'd, 441 U.S. 938, 99 S. Ct. 2153, 60 L. Ed. 2d 1040 (1979).

Treason advocacy statute overbroad

U.S.—Knights of the Ku Klux Klan v. Martin Luther King, Jr. Worshippers, 735 F. Supp. 745, 60 Ed. Law Rep. 494 (M.D. Tenn. 1990).

12 U.S.—Herndon v. Lowry, 301 U.S. 242, 57 S. Ct. 732, 81 L. Ed. 1066 (1937).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

14. National Defense and Security; Military Service or Registration

§ 1113. First Amendment restrictions for national security

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490, 1504, 1517, 1569, 1616, 1803, 1860, 1867, 1925

The First Amendment guaranty of free speech is subject to restraint in the interest of national security.

The right to free speech and the value of an informed citizenry is not absolute and must yield to the government's legitimate efforts to ensure the environment of physical security which a functioning democracy requires.[1] While the invocation of "national security" does not free Congress from the restraints of the First Amendment guaranty of free speech, the societal value of speech must, on occasion, be subordinated to other values and considerations, including national security.[2]

Freedom of speech does not protect acts and utterances calculated to interfere with the power of Congress to provide for the common defense and to insure the survival of the nation by taking actions necessary for the national security.[3] When speech clearly presents an immediate danger to the national security, the protection of the First Amendment ceases.[4]

Licensing requirements on the export of computer source code relating to the encryption of computer programs constituted an unlawful prior restraint in violation of the First Amendment since national security alone did not justify the prior restraint.[5]

Classified information.

A First Amendment right does not exist when the disclosure of classified information would possibly endanger national security even though the information has been previously in the public domain.[6] A prosecution and conviction for disclosing national security information in violation of the defendant's security clearance, even if the disclosures constitute speech, is not a First Amendment violation.[7]

National Security Letters.

The nondisclosure provisions of the National Security Letter (NSL) Statute, as a content-based restriction on expression under the First Amendment, failed to meet the strict scrutiny standard of a restriction narrowly tailored to promote a compelling government interest in national security.[8] Patriot Act provisions mandating a standard of review and judicial deference in a First Amendment assessment of NSL nondisclosure orders violated First Amendment standards by purporting to displace the judicial obligation to enforce constitutional requirements with the fiat of a government official.[9]

Footnotes

1 U.S.—U.S. v. Rosen, 445 F. Supp. 2d 602 (E.D. Va. 2006), opinion amended on other grounds, 2006 WL 5049154 (E.D. Va. 2006) and aff'd, 557 F.3d 192 (4th Cir. 2009).

2 U.S.—U.S. v. Rosen, 445 F. Supp. 2d 602 (E.D. Va. 2006), opinion amended on other grounds, 2006 WL 5049154 (E.D. Va. 2006) and aff'd, 557 F.3d 192 (4th Cir. 2009).
Compulsory testimony from journalist
U.S.—U.S. v. Sterling, 724 F.3d 482 (4th Cir. 2013), cert. denied, 134 S. Ct. 2696, 189 L. Ed. 2d 739 (2014).
Proceedings closed to journalists
U.S.—North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002).

3 U.S.—Warren v. U.S., 177 F.2d 596 (10th Cir. 1949).

4 U.S.—U.S. v. Josephson, 165 F.2d 82 (C.C.A. 2d Cir. 1947).
Reasonable expectation of serious damage
U.S.—Berntsen v. C.I.A., 618 F. Supp. 2d 27 (D.D.C. 2009); Stillman v. C.I.A., 517 F. Supp. 2d 32 (D.D.C. 2007).
Travel for protest contrary to national security
U.S.—Karpova v. Snow, 402 F. Supp. 2d 459 (S.D. N.Y. 2005), aff'd, 497 F.3d 262 (2d Cir. 2007).

5 U.S.—Bernstein v. U.S. Dept. of State, 945 F. Supp. 1279 (N.D. Cal. 1996).

6 U.S.—American Library Ass'n v. Faurer, 631 F. Supp. 416 (D.D.C. 1986), judgment aff'd, 818 F.2d 81, 39 Ed. Law Rep. 516 (D.C. Cir. 1987).
Classification of defense documents not violation
U.S.—Stillman v. C.I.A., 517 F. Supp. 2d 32 (D.D.C. 2007).
CIA censorship not violation
U.S.—Berntsen v. C.I.A., 618 F. Supp. 2d 27 (D.D.C. 2009).
Espionage by unauthorized possession of documents
U.S.—U.S. v. Drake, 818 F. Supp. 2d 909 (D. Md. 2011).

7 U.S.—U.S. v. Kim, 808 F. Supp. 2d 44 (D.D.C. 2011).

8 U.S.—In re National Sec. Letter, 930 F. Supp. 2d 1064 (N.D. Cal. 2013).

9 U.S.—John Doe, Inc. v. Mukasey, 549 F.3d 861 (2d Cir. 2008), as modified on other grounds (Mar. 26, 2009).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

14. National Defense and Security; Military Service or Registration

§ 1114. First Amendment rights of members of military services

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2035, 2037

Members of the military services are not excluded from the protection of the First Amendment guaranty of freedom of speech but greater restrictions may apply than are permissible in a civilian context.

Members of the military services are not excluded from the protection of the First Amendment guaranty of freedom of speech, but the peculiar character of the military community and of the military mission requires that the guaranty be differently applied.[1] The government, acting through military authorities, may prohibit or restrict speech or press activity by military personnel which is likely to interfere with the demands of discipline and duty which are vital prerequisites of military effectiveness.[2] The First Amendment protects speech in the military unless the speech interferes with or prevents orderly accomplishment of mission or presents clear danger to loyalty, discipline, mission, or morale of troops.[3] In a military context, speech that undermines the effectiveness of response to command is unprotected by First Amendment.[4]

Governmental restrictions on speech that would run afoul of the United States Constitution if imposed in civilian life can pass constitutional muster in a military context.[5] Military officials need not demonstrate actual harm before implementing a

regulation restricting speech and may act to forestall reasonably anticipated harm to morale or to the orderly functioning of the base.[6]

There is no constitutional impediment to the use of speech as relevant evidence of facts that may furnish a permissible basis for separation from military service.[7]

Footnotes

1 U.S.—Parker v. Levy, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974).

2 U.S.—Brown v. Glines, 444 U.S. 348, 100 S. Ct. 594, 62 L. Ed. 2d 540 (1980).
Right must yield to discipline
U.S.—Wright v. U.S. Army, 307 F. Supp. 2d 1065 (D. Ariz. 2004).

3 U.S.—Stein v. Dowling, 867 F. Supp. 2d 1087 (S.D. Cal. 2012).

4 U.S.—Parker v. Levy, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974).
Encouraged disobedience to orders
U.S.—Millican v. U.S., 744 F. Supp. 2d 296 (D.D.C. 2010).

5 U.S.—U.S. v. Forney, 67 M.J. 271 (C.A.A.F. 2009); Able v. U.S., 88 F.3d 1280 (2d Cir. 1996).

6 U.S.—U.S. v. Corrigan, 144 F.3d 763 (11th Cir. 1998).

7 U.S.—Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

14. National Defense and Security; Military Service or Registration

§ 1115. First Amendment rights of expression concerning selective service laws

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1860, 2036

Selective service laws do not violate the First Amendment guaranty of freedom of speech but expressing opposition to selective service laws is protected speech.

The First Amendment protects expressions in opposition to the Selective Service system.[1]

Selective service laws, intended to select persons for compulsory military service, do not violate the First Amendment guaranty of freedom of speech by requiring civilian work by conscientious objectors,[2] prohibiting the destruction or mutilation of draft cards and prosecuting violators of the prohibition,[3] or requiring applicants for federal financial assistance to file a statement of compliance with or exemption from registration requirements.[4]

The policy of passive enforcement for failure to register with the Selective Service System, under which only those who themselves advise the Service of their failure or who are reported by others are prosecuted, does not violate the First Amendment right of free speech.[5]

Purposeful destruction of the property and records of a selective service office is not within the protection of the free speech guaranty so as to prevent prosecution for such conduct.[6]

Footnotes

1 U.S.—Bond v. Floyd, 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235 (1966).

2 U.S.—O'Connor v. U. S., 415 F.2d 1110 (9th Cir. 1969).

3 U.S.—U.S. v. Zink, 436 F.2d 1248 (8th Cir. 1971).

4 U.S.—Dickinson v. Bell, 580 F. Supp. 432 (D.D.C. 1984), judgment aff'd and remanded on other grounds, 757 F.2d 372 (D.C. Cir. 1985).

5 U.S.—Wayte v. U.S., 470 U.S. 598, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985).

6 U.S.—U.S. v. Baranski, 484 F.2d 556 (7th Cir. 1973).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

15. Prisons and Prisoners

§ 1116. General protection and limitation of First Amendment rights of prisoners

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2270, 2271, 2279

The First Amendment guaranty of free speech extends to prison inmates, subject to limitations by the interests of government in the security of prisons; restrictions must be reasonably related to a legitimate penological interest and must operate in a content-neutral fashion.

The First Amendment guaranty of free speech extends to prison inmates but the First Amendment rights of prison inmates are more limited in scope than the rights of individuals in society at large when those rights are inconsistent with the correction system's legitimate penological objectives.[1] Thus, inmates' freedom of speech is limited by the prison's legitimate concerns with or interests in prison security.[2] Restrictions on prison inmates' free speech rights must be balanced against the State's legitimate interest in confining prisoners to deter crime, to protect society by quarantining criminal offenders for period of time during which rehabilitative procedures can be applied, and to maintain internal security of penal institutions.[3]

In determining whether a prison regulation impinging on inmates' constitutional rights is valid as reasonably related to a legitimate penological interest, the court must consider whether there is valid, rational connection between prison regulation and a legitimate governmental interest put forward to justify it; whether there are alternative means of exercising rights that

remain open to inmates; whether the accommodation of asserted rights will have a significant "ripple effect" on fellow inmates or prison staff; and whether there is a ready alternative to regulation that fully accommodates prisoners' rights at de minimis cost to valid penological interests.[4] If a prison fails to show that a regulation impinging on a constitutional right is rationally related to a legitimate penological objective, the court does not consider other factors, but if the regulation is rationally related to a legitimate penological objective, the other three factors must also be evaluated before a court can decide whether the prison regulation or policy is permissible.[5]

The reasonable relation test is not satisfied when the logical connection between the regulation and asserted goal is so remote as to render the policy arbitrary or irrational or where the goal is not legitimate and neutral.[6] When the accommodation of an inmate's asserted constitutional right will have a significant "ripple effect" on fellow inmates or on prison staff, the courts should be particularly deferential to the informed discretion of corrections officials in adopting a regulation which impinges on that right.[7] If an inmate who challenges prison regulation can point to an alternative regulation that would fully accommodate the prisoner's rights at de minimis cost to valid penological interests, then the court may consider this as evidence that the regulation is not reasonably related to valid penological interest.[8]

The court must also inquire whether prison regulations restricting inmates' First Amendment free speech rights operate in a neutral fashion, meaning that the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression.[9] A regulation can be considered neutral even if it is content or viewpoint specific.[10]

To prevail on a First Amendment retaliation claim, a prison inmate must establish that: (1) the inmate's speech was constitutionally protected; (2) the inmate suffered adverse action such that the prison official's allegedly retaliatory conduct would likely deter a person of ordinary firmness from engaging in such speech; and (3) there is causal relationship between the retaliatory discipline and the protected speech.[11]

The public concern test developed in the public employment context has no application to prisoners' First Amendment claims, even in the case of speech by a prisoner-employee.[12] A prisoner's speech can be protected even when it does not involve a matter of public concern.[13]

CUMULATIVE SUPPLEMENT

Cases:

State inmate's refusals to provide both false information, and truthful information as prison snitch on an ongoing basis, were protected by the First Amendment; inmate was put on a highly restrictive status for over six months following mild work-related injuries from falling can when inmate refused vague and repeated demands for inmate to act as potential prison informant, contrary to inmate's wishes and at great physical peril, and there was no indication that inmate was engaged in wrongful conduct. U.S. Const. Amend. 1. Burns v. Martuscello, 890 F.3d 77 (2d Cir. 2018).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Shaw v. Murphy, 532 U.S. 223, 121 S. Ct. 1475, 149 L. Ed. 2d 420 (2001); Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987); Pell v. Procunier, 417 U.S. 817, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974); Stauffer v. Gearhart, 741 F.3d 574 (5th Cir. 2014); Jackson v. Frank, 509 F.3d 389 (7th Cir. 2007).

Cal.—Snow v. Woodford, 128 Cal. App. 4th 383, 26 Cal. Rptr. 3d 862 (4th Dist. 2005).

No greater protection under state constitution

N.J.—Pryor v. Department of Corrections, 395 N.J. Super. 471, 929 A.2d 1091 (App. Div. 2007).

2 U.S.—Toston v. Thurmer, 689 F.3d 828 (7th Cir. 2012).

3 U.S.—Pell v. Procunier, 417 U.S. 817, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974).

Factors for balancing of interests

Conn.—Commissioner of Correction v. Coleman, 303 Conn. 800, 38 A.3d 84 (2012), cert. denied, 133 S. Ct. 1593, 185 L. Ed. 2d 589 (2013).

4 U.S.—Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987); DeMoss v. Crain, 636 F.3d 145 (5th Cir. 2011); Jackson v. Frank, 509 F.3d 389 (7th Cir. 2007); Hrdlicka v. Reniff, 631 F.3d 1044 (9th Cir. 2011); Jones v. Salt Lake County, 503 F.3d 1147 (10th Cir. 2007).

Conn.—Commissioner of Correction v. Coleman, 303 Conn. 800, 38 A.3d 84 (2012), cert. denied, 133 S. Ct. 1593, 185 L. Ed. 2d 589 (2013).

N.J.—Pryor v. Department of Corrections, 395 N.J. Super. 471, 929 A.2d 1091 (App. Div. 2007).

5 U.S.—Hrdlicka v. Reniff, 631 F.3d 1044 (9th Cir. 2011).

6 U.S.—Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

7 U.S.—Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

8 U.S.—Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

9 U.S.—Stauffer v. Gearhart, 741 F.3d 574 (5th Cir. 2014); Prison Legal News v. Livingston, 683 F.3d 201 (5th Cir. 2012).

Content neutrality required

U.S.—Jones v. Salt Lake County, 503 F.3d 1147 (10th Cir. 2007).

Cal.—Snow v. Woodford, 128 Cal. App. 4th 383, 26 Cal. Rptr. 3d 862 (4th Dist. 2005).

10 U.S.—Stauffer v. Gearhart, 741 F.3d 574 (5th Cir. 2014); Prison Legal News v. Livingston, 683 F.3d 201 (5th Cir. 2012).

11 U.S.—O'Bryant v. Finch, 637 F.3d 1207 (11th Cir. 2011).

Alternative statement of elements

U.S.—Bridges v. Gilbert, 557 F.3d 541 (7th Cir. 2009).

12 U.S.—Watkins v. Kasper, 599 F.3d 791 (7th Cir. 2010).

13 U.S.—Bridges v. Gilbert, 557 F.3d 541 (7th Cir. 2009).

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16B C.J.S. Constitutional Law § 1117

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

15. Prisons and Prisoners

§ 1117. Particular applications of prisoners' First Amendment rights

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2273, 2275, 2276, 2277, 2289 to 2298, 2301, 2303

The First Amendment guaranty of free speech preserves to prison inmates various particular rights of expression or communication, within the generally applicable constraints of the government's legitimate penological interests.

Subject to regulations or restraints reasonably related to the government's legitimate penological interests,[1] the First Amendment guaranty of free speech preserves to prison inmates the right to make complaints about the conditions of confinement,[2] the right to use a prison's grievance procedures,[3] the right to criticize prison officials,[4] the right to initiate litigation in good faith,[5] the right to communicate with news media,[6] the right to send and receive mail,[7] the right to send and receive Internet mail,[8] the right to communicate with the inmate's attorneys by mail,[9] the right to telephone access,[10] and the right to receive information and ideas in published material[11] except obscene material.[12]

Inmates do not have an unrestricted right to view unedited R-rated motion pictures or movies.[13] Restrictions may also apply to fantasy role-playing games based on their potential to incite gang behavior and violence.[14]

Restrictions on prisoners' clothing and grooming are generally upheld.[15]

Prison inmates' First Amendment rights of expression are generally subject to restrictions on their use of vulgar, abusive, threatening, or other improper language.[16]

CUMULATIVE SUPPLEMENT

Cases:

In context of First Amendment retaliation claim brought by an inmate, there is a difference between a transfer motivated by the fact that the inmate sued and one motivated by the nature of the dispute underlying the lawsuit, even though both would be directly caused by the inmate's protected activity. U.S. Const. Amend. 1. Holleman v. Zatecky, 951 F.3d 873 (7th Cir. 2020).

Administrative Procedure Act's (APA) notice and comment procedures did not apply to prison officials' interpretation of prison regulation that prohibited threatening another with bodily harm as including non-true threats, since such interpretation did not create new substantive rule, given that non-true threats were nonetheless threatening and unacceptable in a prison setting. 5 U.S.C.A. § 553(b)(3)(A); 28 C.F.R. § 541.3. Lane v. Salazar, 911 F.3d 942 (9th Cir. 2018).

Bureau of Prisons (BOP) regulation prohibiting threatening another with bodily harm or any other offense was not overly broad restriction on inmate speech under First Amendment; regulation prohibited communications in a context where threats by inmates could give rise to reasonable concerns about institutional security and individual rehabilitation, and legitimate government interests of protecting prison personnel were at stake. U.S. Const. Amend. 1; 28 C.F.R. § 541.3. Lane v. Swain, 910 F.3d 1293 (9th Cir. 2018).

[END OF SUPPLEMENT]

Footnotes

1 § 1116.

2 U.S.—O'Bryant v. Finch, 637 F.3d 1207 (11th Cir. 2011); Benton v. Rousseau, 940 F. Supp. 2d 1370 (M.D. Fla. 2013).

3 U.S.—Burgess v. Moore, 39 F.3d 216 (8th Cir. 1994); Coleman v. Beale, 636 F. Supp. 2d 207 (W.D. N.Y. 2009).
No right to make threats
Wash.—In re Parmelee, 115 Wash. App. 273, 63 P.3d 800 (Div. 1 2003).
No right to vulgar or insolent language
U.S.—Huff v. Mahon, 312 Fed. Appx. 530 (4th Cir. 2009).

4 U.S.—Freeman v. Texas Dept. of Criminal Justice, 369 F.3d 854 (5th Cir. 2004).
No right to personally abusive comments
U.S.—Goff v. Dailey, 991 F.2d 1437 (8th Cir. 1993).

5 U.S.—Osterback v. Kemp, 300 F. Supp. 2d 1238 (N.D. Fla. 2003), on reconsideration, 300 F. Supp. 2d 1263 (N.D. Fla. 2003).

6 U.S.—Pell v. Procunier, 417 U.S. 817, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974); Stefanoff v. Hays County, Tex., 154 F.3d 523 (5th Cir. 1998).
Valid ban of face-to-face meetings
U.S.—Hammer v. Ashcroft, 570 F.3d 798 (7th Cir. 2009).

7 U.S.—Johnson v. Goord, 445 F.3d 532 (2d Cir. 2006); Clement v. California Dept. of Corrections, 364 F.3d 1148 (9th Cir. 2004).

Pa.—Bussinger v. Department of Corrections, 29 A.3d 79 (Pa. Commw. Ct. 2011), aff'd, 619 Pa. 462, 65 A.3d 289 (2013).

Reasonable withholding of public records

Wash.—Livingston v. Cedeno, 164 Wash. 2d 46, 186 P.3d 1055 (2008).

8 U.S.—Clement v. California Dept. of Corrections, 364 F.3d 1148 (9th Cir. 2004).

Reasonable ban for conduct

U.S.—Solan v. Zickefoose, 134 S. Ct. 1499, 188 L. Ed. 2d 373 (2014).

9 U.S.—Al-Amin v. Smith, 511 F.3d 1317 (11th Cir. 2008).

10 U.S.—Beaulieu v. Ludeman, 690 F.3d 1017 (8th Cir. 2012); Cox v. Ashcroft, 603 F. Supp. 2d 1261 (E.D. Cal. 2009).

No right to particular cost

U.S.—Holloway v. Magness, 666 F.3d 1076 (8th Cir. 2012).

11 U.S.—Thornburgh v. Abbott, 490 U.S. 401, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989).

Denying gang magazines

U.S.—Harbin-Bey v. Rutter, 420 F.3d 571, 2005 FED App. 0354P (6th Cir. 2005).

Permitting nonsubscription bulk deliveries

U.S.—Prison Legal News v. Lehman, 397 F.3d 692 (9th Cir. 2005).

12 U.S.—Harris v. Bolin, 950 F.2d 547 (8th Cir. 1991).

Sexually explicit materials banned

Cal.—Snow v. Woodford, 128 Cal. App. 4th 383, 26 Cal. Rptr. 3d 862 (4th Dist. 2005).

13 U.S.—Wolf v. Ashcroft, 297 F.3d 305 (3d Cir. 2002); Jewell v. Gonzales, 420 F. Supp. 2d 406 (W.D. Pa. 2006).

14 U.S.—Singer v. Raemisch, 593 F.3d 529 (7th Cir. 2010).

15 U.S.—Betts v. McCaughtry, 827 F. Supp. 1400 (W.D. Wis. 1993), judgment aff'd, 19 F.3d 21 (7th Cir. 1994).

Hair length restriction upheld

Pa.—Meggett v. Pennsylvania Dept. of Corrections, 892 A.2d 872 (Pa. Commw. Ct. 2006), as amended, (Apr. 24, 2006).

No right to cross-dress

U.S.—Star v. Gramley, 815 F. Supp. 276 (C.D. Ill. 1993); Jones v. Warden of Stateville Correctional Center, 918 F. Supp. 1142 (N.D. Ill. 1995).

16 U.S.—Ustrak v. Fairman, 781 F.2d 573 (7th Cir. 1986).

Ban on true threats

Wash.—In re Parmelee, 115 Wash. App. 273, 63 P.3d 800 (Div. 1 2003).

Ban on harassment

N.Y.—Marhone v. LaValley, 107 A.D.3d 1186, 967 N.Y.S.2d 474 (3d Dep't 2013).

Ban on false or insubordinate remarks

U.S.—Smith v. Mosley, 532 F.3d 1270 (11th Cir. 2008).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

15. Prisons and Prisoners

§ 1118. First Amendment rights of noninmates in prison facilities

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2270 to 2304

Persons other than prison inmates generally do not have a First Amendment guaranty of free speech or press within a prison or for purposes of access to a prison or prison inmates.

Under the First Amendment guaranty of free speech and press, the rights of outsiders wishing to communicate with prisoners are correlative to the rights of prisoners and must be analyzed under the same standard,[1] permitting the imposition of reasonable restrictions rationally related to the government's legitimate penological interests.[2] Penal institutions, by definition, are not open or public places for purposes of a First Amendment right of access.[3]

Citizens who insist on continuing a demonstration on the portion of the grounds of a jail reserved for jail purposes, after a warning to leave, so as to interfere with the normal operation of the jail, may constitutionally be convicted of trespass.[4]

News media generally have no First Amendment right of access to a prison, over and above that of other persons.[5] Regulations permitting prisoner visitations by family, friends, attorneys, and the clergy do not require permitting visitations by the press.[6]

Footnotes

1 U.S.—Prison Legal News v. Livingston, 683 F.3d 201 (5th Cir. 2012); Hrdlicka v. Reniff, 631 F.3d 1044 (9th Cir. 2011).

2 § 1116.

3 U.S.—California First Amendment Coalition v. Woodford, 299 F.3d 868, 107 A.L.R.5th 737 (9th Cir. 2002).

4 U.S.—Adderley v. State of Fla., 385 U.S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966).

5 U.S.—Houchins v. KQED, Inc., 438 U.S. 1, 98 S. Ct. 2588, 57 L. Ed. 2d 553 (1978); Hammer v. Ashcroft, 570 F.3d 798 (7th Cir. 2009).

Face-to-face interviews reasonably banned

U.S.—Saxbe v. Washington Post Co., 417 U.S. 843, 94 S. Ct. 2811, 41 L. Ed. 2d 514 (1974).

Refusal of news interview by inmate's parent

U.S.—Sidebottom v. Schiriro, 927 F. Supp. 1221 (E.D. Mo. 1996).

6 U.S.—Pell v. Procunier, 417 U.S. 817, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

16. Taxation and Licensing

§ 1119. Effect of taxation policies on First Amendment rights

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1572

The First Amendment guaranty of free speech and press is subject to the proper exercise of the government's power of taxation.

The First Amendment guaranty of free speech and press is subject to the proper exercise of the government's power of taxation,[1] including the government's use of tax funds for speech or other expression to advocate and defend its policies.[2]

Differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints, and a tax is suspect under the First Amendment if it targets a small group of speakers.[3] A tax that singles out the press or that targets individual publications within the press places a heavy burden on the state to justify its action.[4] A court will employ heightened scrutiny under the First Amendment when reviewing a tax statute which discriminates on the basis of a taxpayer's speech.[5] A tax based on the content of speech does not become more constitutional because it is a small tax.[6]

A use tax imposed on the cost of paper and ink products consumed in the production of publications, in the absence of a corresponding sales tax, imposes a significant burden on freedom of the press in violation of the First Amendment.[7]

Tax exemptions.

A government entity may not condition a tax exemption on the renunciation of a right to free speech.[8]

CUMULATIVE SUPPLEMENT

Cases:

When conducting an intermediate scrutiny analysis, a court looks first to the substantiality of the state's interest. Wollschlaeger v. Governor of Florida, 797 F.3d 859 (11th Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Ruhaak v. C.I.R., 422 Fed. Appx. 530 (7th Cir. 2011).
State tax does not regulate speech
Kan.—Wagner v. State, 46 Kan. App. 2d 858, 265 P.3d 577 (2011).
N.Y.—New York State United Teachers ex rel. Iannuzzi v. State, 46 Misc. 3d 250, 993 N.Y.S.2d 475, 309 Ed. Law Rep. 1139 (Sup 2014).
Inciting violation not protected speech
U.S.—U.S. v. Citrowske, 951 F.2d 899 (8th Cir. 1991); Sterling Trading, LLC v. U.S., 553 F. Supp. 2d 1152 (C.D. Cal. 2008).
Filing form not protected speech
U.S.—U.S. v. Rosnow, 977 F.2d 399 (8th Cir. 1992).

2 U.S.—Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 125 S. Ct. 2055, 161 L. Ed. 2d 896 (2005); Board of Regents of University of Wisconsin System v. Southworth, 529 U.S. 217, 120 S. Ct. 1346, 146 L. Ed. 2d 193, 142 Ed. Law Rep. 624 (2000).
Compelled speech doctrine inapplicable
U.S.—R.J. Reynolds Tobacco Co. v. Shewry, 423 F.3d 906 (9th Cir. 2005).

3 U.S.—Leathers v. Medlock, 499 U.S. 439, 111 S. Ct. 1438, 113 L. Ed. 2d 494 (1991).
No suppression of ideas
U.S.—Wisconsin Interscholastic Athletic Ass'n v. Gannett Co., Inc., 716 F. Supp. 2d 773 (W.D. Wis. 2010), aff'd on other grounds, 658 F.3d 614, 273 Ed. Law Rep. 63 (7th Cir. 2011).
Content neutral restriction not violation
Kan.—Wagner v. State, 46 Kan. App. 2d 858, 265 P.3d 577 (2011).
Danger of censorship by targeted tax
Nev.—Deja Vu Showgirls v. State, Dept. of Tax., 334 P.3d 392, 130 Nev. Adv. Op. No. 73 (Nev. 2014).

4 U.S.—Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991).

5 U.S.—Leathers v. Medlock, 499 U.S. 439, 111 S. Ct. 1438, 113 L. Ed. 2d 494 (1991).
Nev.—Deja Vu Showgirls v. State, Dept. of Tax., 334 P.3d 392, 130 Nev. Adv. Op. No. 73 (Nev. 2014).
Pa.—Free Speech, LLC v. City of Philadelphia, 884 A.2d 966 (Pa. Commw. Ct. 2005).

6 U.S.—Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 112 S. Ct. 2395, 120 L. Ed. 2d 101, 75 Ed. Law Rep. 29 (1992).

7 U.S.—Minneapolis Star and Tribune Co. v. Minnesota Com'r of Revenue, 460 U.S. 575, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983).

8 U.S.—F.C.C. v. League of Women Voters of California, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278, 39 Fed. R. Serv. 2d 389 (1984); PTI, Inc. v. Philip Morris Inc., 100 F. Supp. 2d 1179 (C.D. Cal. 2000).

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16B C.J.S. Constitutional Law § 1120

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

16. Taxation and Licensing

§ 1120. Effect of licensing and permits on First Amendment rights

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1590 to 1596

The First Amendment guaranty of free speech and press applies to requirements for licenses or permits, subject to standards depending on whether the requirements are content-neutral or content-based standards.

A licensing or permit scheme's restrictions based on the content of speech—as affecting protected speech—must satisfy strict scrutiny under the First Amendment, requiring that the restriction be narrowly tailored to serve a compelling government interest, without viewpoint restrictions, and without overly broad administrative discretion.[1] A content-neutral licensing or permit scheme controlling the time, place, and manner of speech is permissible if narrowly tailored to serve a significant governmental interest while leaving open ample alternatives for communication,[2] without overly broad administrative discretion.[3]

Procedural safeguards for speech licensing schemes, necessary to prevent a prior restraint in violation of the First Amendment, apply only to content-based subject-matter censorship, not to content-neutral time, place, and manner regulations.[4] In determining whether a permit policy is content-based because it grants an official unbridled discretion, and thus is an unconstitutional prior restraint on speech, the court examines first the purpose behind the regulation.[5]

Under the licensing discretion criterion, the regulation must contain narrow, objective, and definite standards to guide the licensing authority; must require the official to provide an explanation for a decision; and standards must be sufficient to render the official's decision subject to effective judicial review.[6]

CUMULATIVE SUPPLEMENT

Cases:

Unbridled discretion in licensing speech runs afoul of the First Amendment because it risks self-censorship and creates proof problems in as-applied challenges; the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused. U.S. Const. Amend. 1. Freedom From Religion Foundation v. Abbott, 955 F.3d 417 (5th Cir. 2020).

The first question in analyzing a First Amendment free speech challenge is not about a law's purpose, but about its effect, that is, whether it restricts or penalizes speech on the basis of that speech's content. U.S. Const. Amend. 1. Otto v. City of Boca Raton, Florida, 981 F.3d 854 (11th Cir. 2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Green v. City Of Raleigh, 523 F.3d 293 (4th Cir. 2008); International Women's Day March Planning Committee v. City of San Antonio, 619 F.3d 346 (5th Cir. 2010).
Messages on specialty license plates
U.S.—American Civil Liberties Union of North Carolina v. Tata, 742 F.3d 563 (4th Cir. 2014), petition for certiorari filed, 83 U.S.L.W. 3076 (U.S. July 11, 2014); Texas Div., Sons of Confederate Veterans, Inc. v. Vandergriff, 759 F.3d 388 (5th Cir. 2014), cert. granted, 135 S. Ct. 752, 190 L. Ed. 2d 474 (2014).

2 U.S.—Wag More Dogs, Ltd. Liability Corp. v. Cozart, 680 F.3d 359 (4th Cir. 2012); International Women's Day March Planning Committee v. City of San Antonio, 619 F.3d 346 (5th Cir. 2010); 729, Inc. v. Kenton County Fiscal Court, 515 F.3d 485 (6th Cir. 2008).

3 U.S.—Wag More Dogs, Ltd. Liability Corp. v. Cozart, 680 F.3d 359 (4th Cir. 2012).

4 U.S.—Central Radio Co. Inc. v. City of Norfolk, Virginia, 776 F.3d 229 (4th Cir. 2015).

5 U.S.—Bloedorn v. Grube, 631 F.3d 1218, 264 Ed. Law Rep. 638, 71 A.L.R.6th 767 (11th Cir. 2011).

6 U.S.—Long Beach Area Peace Network v. City of Long Beach, 574 F.3d 1011 (9th Cir. 2009).
Difficulties with unbridled schemes
U.S.—Hightower v. City of Boston, 693 F.3d 61 (1st Cir. 2012).

16B C.J.S. Constitutional Law § 1121

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

17. Telephones and Computers

§ 1121. First Amendment protection of telephone communications

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2144 to 2146, 2254

The First Amendment guaranty of free speech and press extends to speech by telephone, subject to reasonable and narrowly tailored content-neutral regulations serving a significant government interest.

Speech by telephone is generally within the protection of the First Amendment guaranty of free speech[1] and free press.[2]

In the context of content-neutral regulation of telephone usage and services, the government may impose reasonable restrictions on the time, place, or manner of protected speech, without violating the First Amendment, provided the restrictions are narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication of the information.[3]

Reasonable restrictions on telephone communications are permissible without violating the First Amendment, such as regulating telephone automatic dialing and announcing devices,[4] restricting telephone providers' usage of customer information,[5] regulating caller identification and call blocking services,[6] taxing users of telephone services,[7] restricting unsolicited telephone

facsimile (fax) transmissions,[8] or imposing sanctions on persons using telephones for criminal activity[9] or other prohibited activity.[10]

Telephone solicitation restrictions.

State statutes precluding tax-exempt charities from using professional telemarketers to make calls to the state's do-not-call list do not violate free speech when protecting residential privacy while allowing the charities' employees and volunteers to make calls.[11] A restriction on unsolicited automated telephone calls, as applied to text messages to cellular phones, is not a free speech violation when narrowly tailored to promote the privacy interests.[12] In contrast, a state statute banning health care providers' telephone solicitations of potential patients who are vulnerable to undue influence was invalid as not sufficiently narrow when lacking any time restriction and using undefined and nonexclusive parameters.[13]

Indecent telephone communication.

A federal act which denies adults access to telephone messages which are indecent but not obscene violates the First Amendment.[14]

CUMULATIVE SUPPLEMENT

Cases:

Montana's Robocall Statute, which restricted automated telephone calls promoting a political campaign or any use related to a political campaign, was a content-based restriction on speech and thus was subject to strict scrutiny; the statute explicitly targeted certain speech for regulation based on the topic of that speech. U.S. Const. Amend. 1; Mont. Code Ann. § 45-8-216(1)(e). Victory Processing, LLC v. Fox, 937 F.3d 1218 (9th Cir. 2019).

City ordinance requiring cell phone retailers to disclose information to prospective purchasers about federal government's radio-frequency radiation exposure guidelines was reasonably related to substantial governmental interest, as required for the disclosure of commercial speech compelled by the ordinance to comply with the First Amendment; federal government and city sought to protect the health and safety of consumers, and city sought to further that interest by compelling retailers to provide information that the government already required cell phone manufacturers to provide to purchasers and to direct purchasers to their user manuals for detailed information. U.S. Const. Amend. 1. CTIA-The Wireless Association v. City of Berkeley, California, 854 F.3d 1105 (9th Cir. 2017).

Ban on unsolicited facsimile advertisements set forth in Telephone Consumer Protection Act (TCPA) was a constitutional regulation of commercial speech, and thus potential damages faced by corporation and its principals that sent such an advertisement to law firm did not violate the First Amendment; while corporation and principals asserted that damages chilled protected speech, and that Congress could have enacted less-restrictive alternative remedy, TCPA was reasonable, as its goal of preventing cost shifting of fax advertising reasonably fit with remedy set forth in TCPA, which banned unsolicited facsimile advertising, since advertisers could still legally have used telephone solicitation, direct mail, or in-person solicitation. U.S. Const. Amend. 1; Communications Act of 1934 § 227, 47 U.S.C.A. § 227(b). McCall Law Firm, PLLC v. Crystal Queen, Inc., 335 F. Supp. 3d 1124 (E.D. Ark. 2018).

Indiana's Automated Dialing Machine Statute (IADMS), which prohibited use of automatic dialing-announcing device unless the subscriber had consented to receipt of the message, was narrowly tailored to serve government interest in protecting residential privacy, as required for statute to not infringe on First Amendment speech rights of non-profit corporation that

sought to place automated interstate telephone calls to Indiana residents to communicate political messages relating to particular candidates or issues of interest to veterans; a live operator could initiate calls and receive consent to deliver message before moving on to next call, live operator permitted recipients to request to not receive future calls, and statute only prohibited single method of communication. U.S. Const. Amend. 1; Ind. Code Ann. § 24-5-14-2. Patriotic Veterans, Inc. v. State of Indiana, 177 F. Supp. 3d 1120 (S.D. Ind. 2016).

Telephone Consumer Protection Act's (TCPA) exemption of nonprofit organizations from its definition of telephone solicitation survived *Central Hudson* test for reviewing challenges to restrictions on commercial speech, where definition did not solely pertain to unlawful or misleading activity, governmental interest, residential privacy, was significant, restriction directly advanced government's asserted interest, as two main sources of consumer problems Congress identified when enacting TCPAhigh volume of solicitations and unexpected solicitationswere not present in solicitations by nonprofit organizations, and definition did not burden more speech than was necessary to further governmental interest in residential privacy. U.S. Const. Amend. 1; Communications Act of 1934 § 227, 47 U.S.C.A. § 227(a)(4). Doohan v. CTB Investors, LLC, 427 F. Supp. 3d 1034 (W.D. Mo. 2019).

Exemption of non-profits from Telephone Consumer Protection Act's (TCPA) definition of telephone solicitation as incorporated in the national do-not-call registry provision was a permissible restriction on commercial speech under *Central Hudson*; although definition did not solely pertain to unlawful or misleading activity, and thus was protected by First Amendment, statute protected the significant governmental interest in residential privacy by permitting consumers to affirmatively represent that an unconsented telephone solicitation was unwanted and by directly reducing the prevalence of unwanted calls, and statute was a content-neutral and viewpoint-neutral restriction that limited the degree of government interference with First Amendment interests. U.S. Const. Amend. 1; Communications Act of 1934 § 227, 47 U.S.C.A. § 227(a)(4). Hand v. Beach Entertainment KC, LCC, 425 F. Supp. 3d 1096 (W.D. Mo. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Maryland v. Universal Elections, Inc., 729 F.3d 370 (4th Cir. 2013); Gomez v. Campbell-Ewald Co., 768 F.3d 871 (9th Cir. 2014); Verizon California, Inc. v. F.C.C., 555 F.3d 270 (D.C. Cir. 2009).

2 U.S.—The New York Times Co. v. Gonzales, 459 F.3d 160 (2d Cir. 2006).
No violation by inspection of toll-call records
U.S.—Reporters Committee for Freedom of Press v. American Tel. & Tel. Co., 593 F.2d 1030 (D.C. Cir. 1978).

3 U.S.—Maryland v. Universal Elections, Inc., 729 F.3d 370 (4th Cir. 2013); National Coalition of Prayer, Inc. v. Carter, 455 F.3d 783 (7th Cir. 2006); Gomez v. Campbell-Ewald Co., 768 F.3d 871 (9th Cir. 2014).

4 U.S.—Gomez v. Campbell-Ewald Co., 768 F.3d 871 (9th Cir. 2014).
Content neutral regulation of robo-calls
U.S.—Maryland v. Universal Elections, Inc., 729 F.3d 370 (4th Cir. 2013).

5 U.S.—Verizon California, Inc. v. F.C.C., 555 F.3d 270 (D.C. Cir. 2009).

6 U.S.—People of State of Cal. v. F.C.C., 75 F.3d 1350 (9th Cir. 1996).

7 U.S.—Saltzman v. U.S., 516 F.2d 891 (9th Cir. 1975).

8 U.S.—Missouri ex rel. Nixon v. American Blast Fax, Inc., 323 F.3d 649 (8th Cir. 2003).

9 U.S.—U.S. v. Eckhardt, 466 F.3d 938, 71 Fed. R. Evid. Serv. 474 (11th Cir. 2006).
Harassment
U.S.—Shackelford v. Shirley, 948 F.2d 935 (5th Cir. 1991).
Crude and offensive language
N.Y.—People v. Mangano, 100 N.Y.2d 569, 764 N.Y.S.2d 379, 796 N.E.2d 470 (2003).

10 U.S.—Walraven v. NC Bd. of Chiropractic Examiners, 273 Fed. Appx. 220 (4th Cir. 2008).

11 U.S.—National Coalition of Prayer, Inc. v. Carter, 455 F.3d 783 (7th Cir. 2006); Fraternal Order of Police, N.D. State Lodge v. Stenehjem, 431 F.3d 591 (8th Cir. 2005).

12 U.S.—Gomez v. Campbell-Ewald Co., 768 F.3d 871 (9th Cir. 2014).

13 U.S.—Speaks v. Kruse, 445 F.3d 396 (5th Cir. 2006).

14 U.S.—Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989).

End of Document

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

17. Telephones and Computers

§ 1122. First Amendment protection of computer communications and code

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2147

The First Amendment guaranty of free speech extends to communications expressed in the language of computer code and computer programs constructed from code.

The First Amendment guaranty of free speech extends to communications expressed in the language of computer code and computer programs constructed from code.[1] Computer programs are not exempted from the category of First Amendment speech simply because their instructions require the use of a computer; the fact that a program has the capacity to direct the functioning of a computer does not mean that it lacks the additional capacity to convey information, and it is the conveying of information that renders instructions "speech" for purposes of the First Amendment.[2] In contrast, the output of computer software for trading currency futures, marketed as an automatic trading system generating "buy" and "sell" instructions, is not "speech," and thus, requiring the software seller to register as commodity trading advisor does not violate the First Amendment.[3]

Game promotions on an Internet cafe owner's computers—constituting slot machines under state law—did not constitute commercial speech under the First Amendment, notwithstanding the owner's claim that the promotions stimulated interest in its consumer products and services, as well as promoting their sale; communicating the results of a computer-based game of chance

does not rise to the level of First Amendment protection because informing a consumer of a win or loss does not communicate ideas.[4]

An ordinance declaring "Computer Gaming and Internet Access Businesses" are nuisances and summarily prohibiting their operation is subject to First Amendment scrutiny as a content neutral restraint and is invalid as overbroad, since it applies without regard to whether the computer or device is used to operate a sweepstakes promotion or to read a news article, reaching beyond the sweepstakes promotions purportedly targeted to encompass computing activities associated with expression, such as word processing programs and slideshow software.[5]

Digital Millennium Copyright Act.

To the extent that the Digital Millennium Copyright Act (DMCA) targets computer code, Congress sought to ban the code not because of what the code says but rather because of what the code does, making the restriction on speech content neutral and valid under intermediate scrutiny for promotion of a substantial government interest in a restriction that does not substantially burden more speech than is reasonably necessary.[6]

Footnotes

1 U.S.—Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001); Junger v. Daley, 209 F.3d 481, 2000 FED App. 0117P (6th Cir. 2000).
As to the Internet and the First Amendment, generally, see §§ 1040 to 1043.
Source code and object code included
U.S.—U.S. v. Elcom Ltd., 203 F. Supp. 2d 1111 (N.D. Cal. 2002).
Evidentiary seizure of computers not prior restraint
U.S.—Guest v. Leis, 255 F.3d 325, 2001 FED App. 0206P (6th Cir. 2001).

2 U.S.—Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001).

3 U.S.—Commodity Futures Trading Com'n v. Vartuli, 228 F.3d 94 (2d Cir. 2000).

4 U.S.—Incredible Investments, LLC v. Fernandez-Rundle, 984 F. Supp. 2d 1318 (S.D. Fla. 2013).

5 U.S.—IBiz, LLC v. City of Hayward, 962 F. Supp. 2d 1159 (N.D. Cal. 2013).

6 U.S.—U.S. v. Elcom Ltd., 203 F. Supp. 2d 1111 (N.D. Cal. 2002).

16B C.J.S. Constitutional Law § 1123

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

18. Attorneys and Judges

§ 1123. First Amendment rights of attorneys

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1958, 2040 to 2049

The First Amendment guaranty of free speech applies to attorneys, subject to reasonable government regulation narrowly tailored in furtherance of substantial governmental interests.

The First Amendment guaranty of free speech applies to attorneys,[1] as to every citizen,[2] and courts will afford speech to the public by attorneys on public issues and matters of legal representation the strongest protection the Constitution has to offer.[3] Attorneys have a First Amendment right, let alone an established professional ethical duty, to advise and zealously represent their clients.[4] Attorney speech may be subject to diminished First Amendment protection when it is regulated in furtherance of substantial governmental interests,[5] as may entail either restricted or compelled speech as a professional,[6] but regulations may impose only narrow and necessary limitations on an attorney's speech.[7]

An attorney's right to communicate with clients and prospective clients is not unfettered,[8] and when an attorney speaks on behalf of a client, the attorney's right to speak is almost always grounded in the rights of the client rather than any independent rights of the attorney.[9]

An the attorney's right to free speech is tempered by obligations to both the courts and the bar,[10] including restrictions on statements that constitute interference with judicial proceedings,[11] and the limitations imposed by rules of professional conduct and discipline.[12]

Attorneys retain some First Amendment rights outside of the courtroom, even for speech that touches upon their representation of clients,[13] but an attorney's First Amendment right to free speech is extremely circumscribed in the courtroom[14] and, in a pending case, is limited outside the courtroom as well to a degree that would not apply to an ordinary citizen.[15]

Public employment.

An attorney, serving in a position as a public employee—such as a public defender—speaks as a protected citizen only on matters of public concern and not in the performance of official duties and is protected from adverse employment actions only to that extent.[16] A city attorney's complaints in the capacity of an employee and directly related to job responsibilities are not protected speech, but speech relating to violations of public policy to superiors and others outside the chain of command goes to matters of public concern and is protected.[17]

Bar membership.

Bar admission restrictions for attorneys are time, manner, and place restrictions on speech, subject only to a reasonableness standard and narrow tailoring to serve a substantial state interest.[18] Compulsory Bar fees must be limited to funding germane Bar activities.[19]

Continuing legal education.

Continuing legal education rules applicable to attorneys do not violate the attorney's free speech rights, when the requirements and costs are germane to legitimate regulatory goals of the state.[20]

Nonlawyers.

The activities of nonlawyers in giving legal advice do not constitute protected speech.[21]

Footnotes

1 U.S.—Mezibov v. Allen, 411 F.3d 712, 2005 FED App. 0264P (6th Cir. 2005); In re Reines, 771 F.3d 1326 (Fed. Cir. 2014).
Iowa—Iowa Supreme Court Attorney Disciplinary Bd. v. Weaver, 750 N.W.2d 71 (Iowa 2008).
As to attorneys as regulated businesses for First Amendment commercial speech purposes, see § 947.
As to advertising by attorneys, generally, see C.J.S., Attorney and Client § 46.
Right to commercial speech
Ariz.—State v. Lang, 234 Ariz. 457, 323 P.3d 740 (Ct. App. Div. 1 2014), review denied, (Jan. 6, 2015).

2 U.S.—Mezibov v. Allen, 411 F.3d 712, 2005 FED App. 0264P (6th Cir. 2005).
Colo.—In re Foster, 253 P.3d 1244 (Colo. 2011).

3 U.S.—Wollschlaeger v. Governor of Florida, 760 F.3d 1195 (11th Cir. 2014).

4 U.S.—Legal Services Corp. v. Velazquez, 531 U.S. 533, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001).

5 U.S.—Hersh v. U.S. ex rel. Mukasey, 553 F.3d 743 (5th Cir. 2008).
Tex.—Celis v. State, 354 S.W.3d 7 (Tex. App. Corpus Christi 2011), petition for discretionary review granted, (Feb. 1, 2012) and judgment aff'd, 416 S.W.3d 419 (Tex. Crim. App. 2013).
Va.—Hunter v. Virginia State Bar ex rel. Third Dist. Committee, 285 Va. 485, 744 S.E.2d 611 (2013), cert. denied, 133 S. Ct. 2871, 186 L. Ed. 2d 913 (2013).

6 U.S.—Hersh v. U.S. ex rel. Mukasey, 553 F.3d 743 (5th Cir. 2008).

7 U.S.—Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991).

8 U.S.—In re Reines, 771 F.3d 1326 (Fed. Cir. 2014).

9 U.S.—Eng v. Cooley, 552 F.3d 1062 (9th Cir. 2009).

10 U.S.—Petersen v. Florida Bar, 720 F. Supp. 2d 1351 (M.D. Fla. 2010).

11 § 969.

12 U.S.—Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014), cert. denied, 134 S. Ct. 2881, 189 L. Ed. 2d 833 (2014) and cert. denied, 134 S. Ct. 2871, 189 L. Ed. 2d 833 (2014).
Mass.—Schoeller v. Board of Registration of Funeral Directors and Embalmers, 463 Mass. 605, 977 N.E.2d 524 (2012).
Must be narrowly tailored to compelling interest
N.J.—R.M. v. Supreme Court, 185 N.J. 208, 883 A.2d 369 (2005).
Unprotected comments outside public concern
W. Va.—Lawyer Disciplinary Bd. v. Hall, 234 W. Va. 298, 765 S.E.2d 187 (2014).

13 U.S.—Mezibov v. Allen, 411 F.3d 712, 2005 FED App. 0264P (6th Cir. 2005).

14 U.S.—Berry v. Schmitt, 688 F.3d 290 (6th Cir. 2012).
Kan.—In re Hawver, 300 Kan. 1023, 339 P.3d 573 (2014).
Constitutional nadir in courtroom
U.S.—Mezibov v. Allen, 411 F.3d 712, 2005 FED App. 0264P (6th Cir. 2005).

15 Va.—Anthony v. Virginia State Bar ex rel. Ninth Dist. Committee, 270 Va. 601, 621 S.E.2d 121 (2005).

16 U.S.—Flora v. County of Luzerne, 776 F.3d 169 (3d Cir. 2015).
A.L.R. Library
First Amendment protection for judges or government attorneys subjected to discharge, transfer, or discipline because of speech, 108 A.L.R. Fed. 117.

17 U.S.—Handy-Clay v. City of Memphis, Tenn., 695 F.3d 531 (6th Cir. 2012).

18 U.S.—National Ass'n for the Advancement of Multijurisdiction Practice v. Berch, 773 F.3d 1037 (9th Cir. 2014), petition for certiorari filed, 83 U.S.L.W. 3764 (U.S. Mar. 19, 2015).

19 U.S.—Kingstad v. State Bar of Wis., 622 F.3d 708 (7th Cir. 2010).

20 Minn.—In re Rothenberg, 676 N.W.2d 283 (Minn. 2004).

21 Colo.—People v. Shell, 148 P.3d 162 (Colo. 2006).
Mont.—Montana Supreme Court Com'n on Unauthorized Practice of Law v. O'Neil, 2006 MT 284, 334 Mont. 311, 147 P.3d 200 (2006).
Ohio—Cincinnati Bar Assn. v. Bailey, 110 Ohio St. 3d 223, 2006-Ohio-4360, 852 N.E.2d 1180 (2006).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

18. Attorneys and Judges

§ 1124. First Amendment rights of judges

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2050 to 2052

The First Amendment guaranty of free speech is subject to government restrictions as applied to judges.

Judges, as attorneys, are subject to the same First Amendment free speech rights and constraints as attorneys[1] and may be subject to judicial disciplinary action in restraint of free speech.[2] A state may accomplish its legitimate interests and restrain the public expression of its judges through narrowly tailored limitations when those interests outweigh the judge's free speech interests.[3]

A judicial opinion qualifies as "speech" for purposes of the First Amendment, and the First Amendment protects a sitting judge from being criminally punished for a judicial opinion unless that opinion presents a clear and present danger of prejudicing ongoing proceedings; in order to transgress the threshold of clear and present danger, the speech must constitute an imminent, not merely a likely, threat to the administration of justice.[4]

The First Amendment rights of judges do not preclude limitations on the qualifications of a judge to hear a particular matter or to be disqualified in any proceeding in which the judge's impartiality might reasonably be questioned.[5] A state judicial conduct rule requiring recusal of a judge who makes a public statement that commits or appears to commit the judge to reach a particular

result or rule in a particular way in the proceeding or controversy does not violate the judge's First Amendment free speech rights.[6]

As public employees, the public comments of judges may constitute protected citizen speech only to the extent that the speech meets the public concern test and is not required for the performance of official duties.[7]

Footnotes

1 § 1123.

2 Miss.—Mississippi Com'n on Judicial Performance v. Osborne, 11 So. 3d 107 (Miss. 2009).
N.M.—In re Vincent, 2007-NMSC-056, 143 N.M. 56, 172 P.3d 605 (2007).
Ohio—In re Judicial Campaign Complaint Against O'Toole, 141 Ohio St. 3d 355, 2014-Ohio-4046, 24 N.E.3d 1114 (2014).
Wash.—In re Disciplinary Proceeding Against Eiler, 169 Wash. 2d 340, 236 P.3d 873 (2010).

3 U.S.—Jenevein v. Willing, 493 F.3d 551 (5th Cir. 2007); Republican Party of Minnesota v. White, 416 F.3d 738 (8th Cir. 2005).
N.M.—In re Vincent, 2007-NMSC-056, 143 N.M. 56, 172 P.3d 605 (2007).
Ohio—In re Judicial Campaign Complaint Against O'Toole, 141 Ohio St. 3d 355, 2014-Ohio-4046, 24 N.E.3d 1114 (2014).
As to the free speech rights of judicial candidates, generally, see § 1102.

4 U.S.—In re Kendall, 58 V.I. 718, 712 F.3d 814 (3d Cir. 2013).

5 U.S.—Ligon v. City of New York, 736 F.3d 166, 86 Fed. R. Serv. 3d 1565 (2d Cir. 2013).

6 U.S.—Bauer v. Shepard, 620 F.3d 704 (7th Cir. 2010).

7 U.S.—Cuffeld v. Supreme Court of Pennsylvania, 936 F. Supp. 266 (E.D. Pa. 1996).
Test for protected political speech
Miss.—Mississippi Com'n on Judicial Performance v. Osborne, 11 So. 3d 107 (Miss. 2009).
A.L.R. Library
First Amendment protection for judges or government attorneys subjected to discharge, transfer, or discipline because of speech, 108 A.L.R. Fed. 117.

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Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

19. Harassment, Threats, Stalking, and Hate Crimes or Hate Speech

§ 1125. Application of First Amendment to harassment

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1825 to 1834, 1940

The First Amendment guaranty of free speech does not entail a right to engage in harassing conduct against another person.

There is no categorical harassment exception to the First Amendment guaranty of free speech,[1] but communication and harassment are distinguishable, the difference being that one is protected free speech and the other is conduct that may be proscribed.[2] Conduct that constitutes unlawful harassment is not protected,[3] and may be enjoined,[4] provided the enforcement statute is not unconstitutionally vague[5] or overbroad.[6] A statute penalizing as harassment "repeated unwanted communication to another person" is unconstitutionally overbroad on its face.[7] The speech punished by a harassment statute must be uttered with the specific intention of harassing the listener, since a mere expression of opinion utilizing offensive language is protected speech.[8]

Harassment for the exercise of free speech is actionable under an ordinary firmness standard if the harassment is likely to deter a person of ordinary firmness from the exercise of free speech; in the absence of a change in the affected party's behavior, there

is no chilling of the First Amendment right.[9] Harassment in a First Amendment public employee retaliation context may be actionable if it is designed to deter a public employee's free speech.[10]

Footnotes

1 U.S.—Saxe v. State College Area School Dist., 240 F.3d 200, 151 Ed. Law Rep. 86 (3d Cir. 2001); Rodriguez v. Maricopa County Community College Dist., 605 F.3d 703, 257 Ed. Law Rep. 30 (9th Cir. 2010).

2 U.S.—Test Masters Educational Services, Inc. v. Singh, 428 F.3d 559 (5th Cir. 2005).

3 U.S.—Rodriguez v. Maricopa County Community College Dist., 605 F.3d 703, 257 Ed. Law Rep. 30 (9th Cir. 2010).
Kan.—Smith v. Martens, 279 Kan. 242, 106 P.3d 28 (2005).
Mass.—Com. v. Johnson, 470 Mass. 300, 21 N.E.3d 937 (2014).
N.Y.—Gracie C. v. Nelson C., 118 A.D.3d 417, 987 N.Y.S.2d 333 (1st Dep't 2014).

4 U.S.—Test Masters Educational Services, Inc. v. Singh, 428 F.3d 559 (5th Cir. 2005).
Wis.—Board of Regents-UW System v. Decker, 2014 WI 68, 355 Wis. 2d 800, 850 N.W.2d 112, 306 Ed. Law Rep. 1005 (2014).

5 Mass.—Com. v. Johnson, 470 Mass. 300, 21 N.E.3d 937 (2014).
N.Y.—People v. Golb, 23 N.Y.3d 455, 991 N.Y.S.2d 792, 15 N.E.3d 805 (2014), cert. denied, 135 S. Ct. 1009, 190 L. Ed. 2d 839 (2015).

6 U.S.—Vives v. City of New York, 405 F.3d 115 (2d Cir. 2005); Saxe v. State College Area School Dist., 240 F.3d 200, 151 Ed. Law Rep. 86 (3d Cir. 2001).
Conn.—State v. Book, 155 Conn. App. 560, 109 A.3d 1027 (2015).
Mass.—Com. v. Johnson, 470 Mass. 300, 21 N.E.3d 937 (2014).

7 Mo.—State v. Vaughn, 366 S.W.3d 513 (Mo. 2012).

8 N.J.—N.G. v. J.P., 426 N.J. Super. 398, 45 A.3d 371 (App. Div. 2012).

9 U.S.—Krieger v. U.S. Dept. of Justice, 529 F. Supp. 2d 29 (D.D.C. 2008).

10 U.S.—Massey v. Johnson, 457 F.3d 711, 211 Ed. Law Rep. 619 (7th Cir. 2006).

16B C.J.S. Constitutional Law § 1126

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

19. Harassment, Threats, Stalking, and Hate Crimes or Hate Speech

§ 1126. Application of First Amendment to threats

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1830 to 1832

Threats of violence are not protected speech for purposes of the First Amendment guaranty of free speech.

Threats of violence are not protected speech for purposes of the First Amendment guaranty of free speech,[1] including exhortations to unspecified other persons to commit violence.[2] While the First Amendment generally permits individuals to say what they wish, it allows government to protect individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.[3] True threats are not protected speech.[4] True threats encompass those statements when the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to particular individual or group of individuals; the speaker need not actually intend to carry out the threat since the prohibition on true threats protects individuals from a fear of violence and from the disruption that fear engenders in addition to protecting people from possibility that threatened violence will occur.[5] Prosecution under a statute prohibiting threatening statements is constitutionally permissible under the First Amendment as long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate, and specific as to person threatened that it conveys gravity of purpose and the imminent prospect of execution.[6]

The speaker need not actually intend to carry out the threat.[7] When the government shows that a reasonable person would perceive a threat as real, a true threat may be punished without concern about the risk to protected speech under the First Amendment.[8] Nonetheless, while threats made with specific intent to injure easily fall into the category of speech deserving no First Amendment protection, the risk of improperly criminalizing protected speech increases when the speaker does not intend words to convey a real threat.[9]

When the intent is to do something that, if accomplished, would be unlawful and outside First Amendment protection, the intent helps eliminate First Amendment concerns, but an intent to do something that, if accomplished, would constitute protected expression cannot remove from the ambit of the First Amendment conduct that is otherwise protected expression.[10]

Qualifying threats do not include the kind of hyperbole, rhetorical excesses, and impotent expressions of anger or frustration that in some contexts can be privileged even if they alarm the addressee.[11]

CUMULATIVE SUPPLEMENT

Cases:

Public official's threat to stifle protected speech is actionable under First Amendment, and thus can be enjoined, even if it turns out to be empty. U.S.C.A. Const.Amend. 1. Backpage.com, LLC v. Dart, 807 F.3d 229 (7th Cir. 2015).

Statute criminalizing intentionally or knowingly harming or threatening to harm another in retaliation of their service as a public servant did not implicate First Amendment protections and was not unconstitutionally overbroad; statute punished conduct rather than the content of speech alone and bore a rational relationship to the state's legitimate and compelling interest in protecting public servants from harm. U.S. Const. Amend. 1; Tex. Penal Code Ann. § 36.06(a)(1). Ex parte Eribarne, 525 S.W.3d 784 (Tex. App. Beaumont 2017), petition for discretionary review refused, (Oct. 25, 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003); U.S. v. Szabo, 760 F.3d 997 (9th Cir. 2014); U.S. v. Wheeler, 776 F.3d 736 (10th Cir. 2015); U.S. v. Martinez, 736 F.3d 981 (11th Cir. 2013).
Ill.—People v. Diomedes, 2014 IL App (2d) 121080, 382 Ill. Dec. 712, 13 N.E.3d 125 (App. Ct. 2d Dist. 2014), appeal pending, (Sept. 1, 2014).
Threats against public officials
U.S.—U.S. v. Beale, 620 F.3d 856 (8th Cir. 2010).
Ind.—Brewington v. State, 7 N.E.3d 946 (Ind. 2014), cert. denied, 135 S. Ct. 970, 190 L. Ed. 2d 834 (2015).

2 U.S.—U.S. v. Wheeler, 776 F.3d 736 (10th Cir. 2015).

3 U.S.—Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003); U.S. v. Jeffries, 692 F.3d 473 (6th Cir. 2012), cert. denied, 134 S. Ct. 59, 187 L. Ed. 2d 25 (2013).
Ill.—People v. Diomedes, 2014 IL App (2d) 121080, 382 Ill. Dec. 712, 13 N.E.3d 125 (App. Ct. 2d Dist. 2014), appeal pending, (Sept. 1, 2014).

4 U.S.—Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003); U.S. v. Elonis, 730 F.3d 321 (3d Cir. 2013); U.S. v. Wheeler, 776 F.3d 736 (10th Cir. 2015).
Conn.—State v. Krijger, 313 Conn. 434, 97 A.3d 946 (2014).

Ill.—People v. Diomedes, 2014 IL App (2d) 121080, 382 Ill. Dec. 712, 13 N.E.3d 125 (App. Ct. 2d Dist. 2014), appeal pending, (Sept. 1, 2014).

5 U.S.—Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).

6 Conn.—State v. Krijger, 313 Conn. 434, 97 A.3d 946 (2014).

7 U.S.—Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003); U.S. v. Wheeler, 776 F.3d 736 (10th Cir. 2015).

Subjective intent not required

U.S.—U.S. v. Elonis, 730 F.3d 321 (3d Cir. 2013).

Ill.—People v. Diomedes, 2014 IL App (2d) 121080, 382 Ill. Dec. 712, 13 N.E.3d 125 (App. Ct. 2d Dist. 2014), appeal pending, (Sept. 1, 2014).

8 U.S.—U.S. v. Keyser, 704 F.3d 631 (9th Cir. 2012); U.S. v. Martinez, 736 F.3d 981 (11th Cir. 2013).

Fear of imminent, serious, personal violence

Or.—D.W.C. v. Carter, 261 Or. App. 133, 323 P.3d 348 (2014).

Objective reasonable person standard

Cal.—People v. Chandler, 60 Cal. 4th 508, 176 Cal. Rptr. 3d 548, 332 P.3d 538 (2014).

Conn.—State v. Krijger, 313 Conn. 434, 97 A.3d 946 (2014).

9 Conn.—State v. Krijger, 313 Conn. 434, 97 A.3d 946 (2014).

10 Tex.—Ex parte Thompson, 442 S.W.3d 325 (Tex. Crim. App. 2014).

11 Or.—D.W.C. v. Carter, 261 Or. App. 133, 323 P.3d 348 (2014).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

19. Harassment, Threats, Stalking, and Hate Crimes or Hate Speech

§ 1127. Application of First Amendment to stalking

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1833

The First Amendment guaranty of free speech does not preclude punishment for criminal stalking when the law addresses conduct and not speech.

The First Amendment guaranty of free speech does not preclude punishment for criminal stalking.[1] A criminal defendant's right to free speech is permissibly subordinated to a victim's right to be free of repetitive unwanted verbal and nonverbal communications likely to instill a reasonable fear of harm.[2] A criminal stalking statute is valid if not overbroad,[3] regulating conduct and not speech.[4] The Interstate Stalking Statute is not facially invalid under the First Amendment, since it is directed toward courses of conduct instead of speech, proscribing conduct not necessarily associated with speech and requiring both malicious intent by the accused and substantial harm to the victim.[5]

CUMULATIVE SUPPLEMENT

Cases:

Federal stalking statute was not facially overbroad, such that First Amendment rights of those charged under statute would need to be protected by as-applied challenges; while statute could reach highly expressive conduct such as e-mail messages, it covered countless amounts of conduct that was not expressive, and speech prohibited by statute would amount to true threats or speech integral to criminal conduct that would be unprotected under First Amendment. U.S. Const. Amend. 1; 18 U.S.C.A. § 2261A(2)(B). United States v. Ackell, 907 F.3d 67 (1st Cir. 2018).

Strict scrutiny did not apply to claim that Florida's stalking statute was facially overbroad, since the statute, as a whole, was not primarily a direct restriction on speech, but instead, it dealt mostly with conduct. U.S.C.A. Const.Amend. 1; West's F.S.A. § 784.048. Burroughs v. Corey, 92 F. Supp. 3d 1201 (M.D. Fla. 2015).

Stalking-by-mail statute, which was overbroad in violation of First Amendment, was not reasonably subject to narrowing construction and was thus invalid; even if court were to require actor to know that his communication would frighten, threaten, oppress, persecute, or intimidate victim, protected speech covered by statute would continue to fall within reach of statute under a knowing standard. U.S. Const. Amend. 1; Minn. Stat. Ann. § 609.749(2)(6). Matter of Welfare of A. J. B., 929 N.W.2d 840 (Minn. 2019).

Juvenile's posting of offensive tweets on microblog was unprotected speech integral to criminal conduct, and thus stalking and harassment statutes under which juvenile was adjudicated delinquent were not unconstitutionally overbroad as applied to juvenile's tweets; stalking statute outlawed delivery of messages that offender knew or had reason to know would cause victim to feel frightened, threatened, oppressed, persecuted, or intimidated, harassment statute criminalized delivery, including electronic delivery of messages with intent to abuse, disturb, or cause distress, and juvenile's tweets were posted with intent to cause classmate to suffer distress. U.S. Const. Amend. 1; Minn. Const. art. 1, § 3; Minn. Stat. Ann. §§ 609.749(2)(6), 609.795(1)(3). Matter of Welfare of A.J.B., 910 N.W.2d 491 (Minn. Ct. App. 2018).

Hunter's alleged verbal threats to fellow hunter constituted stalking, and therefore protection order stemming from threats did not violate hunter's constitutional right to free speech. U.S.C.A. Const.Amend. 1. Erickson v. Earley, 2016 SD 37, 878 N.W.2d 631 (S.D. 2016).

A lifetime protective order against ex-husband, premised on stalking and based in part on his e-mails, did not violate his free speech rights, where the e-mails constituted threats and placed ex-wife in fear of bodily injury. U.S. Const. Amend. 1. Webb v. Schlagal, 530 S.W.3d 793 (Tex. App. Eastland 2017), petition for review filed, (Oct. 3, 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—U.S. v. Osinger, 753 F.3d 939 (9th Cir. 2014).
Cal.—People v. McPheeters, 218 Cal. App. 4th 124, 159 Cal. Rptr. 3d 607 (3d Dist. 2013), review denied, (Oct. 30, 2013).
N.Y.—Gracie C. v. Nelson C., 118 A.D.3d 417, 987 N.Y.S.2d 333 (1st Dep't 2014).
A.L.R. Library
Validity, construction, and application of stalking statutes, 29 A.L.R.5th 487.

2 N.Y.—People v. Carboy, 37 Misc. 3d 83, 955 N.Y.S.2d 473 (App. Term 2012), leave to appeal denied, 20 N.Y.3d 1096, 965 N.Y.S.2d 792, 988 N.E.2d 530 (2013).
Insufficient basis of protective order
Or.—E.O. v. Cowger, 252 Or. App. 315, 287 P.3d 1160 (2012).

3 U.S.—U.S. v. Petrovic, 701 F.3d 849 (8th Cir. 2012).

Colo.—People v. Richardson, 181 P.3d 340 (Colo. App. 2007).
Or.—D.A. v. White, 253 Or. App. 754, 292 P.3d 587 (2012).
Wis.—State v. Hemmingway, 2012 WI App 133, 345 Wis. 2d 297, 825 N.W.2d 303 (Ct. App. 2012), review denied, 2013 WI 80, 353 Wis. 2d 429, 839 N.W.2d 616 (2013).

4 Colo.—People v. Richardson, 181 P.3d 340 (Colo. App. 2007).
Minn.—State v. Stockwell, 770 N.W.2d 533 (Minn. Ct. App. 2009).
N.Y.—People v. Carboy, 37 Misc. 3d 83, 955 N.Y.S.2d 473 (App. Term 2012), leave to appeal denied, 20 N.Y.3d 1096, 965 N.Y.S.2d 792, 988 N.E.2d 530 (2013).
Wis.—State v. Hemmingway, 2012 WI App 133, 345 Wis. 2d 297, 825 N.W.2d 303 (Ct. App. 2012), review denied, 2013 WI 80, 353 Wis. 2d 429, 839 N.W.2d 616 (2013).

5 U.S.—U.S. v. Osinger, 753 F.3d 939 (9th Cir. 2014).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

19. Harassment, Threats, Stalking, and Hate Crimes or Hate Speech

§ 1128. Application of First Amendment to hate crimes and hate speech

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1560, 1815, 1834

Hate crimes are acts of conduct, not speech, and are not protected under the First Amendment guaranty of free speech; hateful or derogatory speech is protected speech and is not subject to restriction solely based on content or viewpoint.

The Federal Hate Crimes Prevention Act prohibits violent acts and does not prohibit speech or conduct protected under the First Amendment guaranty of free speech.[1] In contrast, speech described as hateful or intensely derogatory or offensive is within the protection of the First Amendment and cannot be restricted solely for the content of the speech or the viewpoint of the speaker alone.[2] Protection does not extend, however, to "fighting words" delivered in a manner designed or reasonably expected to produce a breach of the peace,[3] nor to true threats.[4]

A state hate crimes statute, raising the level of a charged offense on the basis of the accused's acts motivated by bigoted beliefs, punishes criminal conduct, not protected expression of beliefs.[5] It is the causal connection between prejudice and a prohibited action that protects hate-crime statutes from constitutional challenges under the First Amendment; criminalizing prejudice only, and therefore thoughts, would violate the First Amendment.[6]

Cross burning.

The provision of a state statute that prohibits cross burning with an intent to intimidate a person or group of persons does not violate the First Amendment, but a provision that makes burning a cross prima facie evidence of an intent to intimidate a person or group of persons is overbroad as reaching both protected and unprotected speech.[7] A hate crimes statute specifying cross burning and defacement of property with certain types of symbols or words as per se violations regulates protected symbolic speech based on content and thus is unconstitutional.[8]

CUMULATIVE SUPPLEMENT

Cases:

Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful, but the proudest boast of the Supreme Court's free speech jurisprudence is that it protects the freedom to express hated thoughts. (Per Justice Alito, with three Justices concurring and four Justices concurring in the judgment.) U.S.C.A. Const.Amend. 1. Matal v. Tam, 137 S. Ct. 1744 (2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Glenn v. Holder, 690 F.3d 417, 77 A.L.R. Fed. 2d 605 (6th Cir. 2012), cert. denied, 133 S. Ct. 1581, 185 L. Ed. 2d 576 (2013); U.S. v. Mullet, 868 F. Supp. 2d 618 (N.D. Ohio 2012).

2 U.S.—B.W.A. v. Farmington R-7 School Dist., 554 F.3d 734, 241 Ed. Law Rep. 41 (8th Cir. 2009).
Hate speech is protected
U.S.—American Freedom Defense Initiative v. Washington Metropolitan Area Transit Authority, 898 F. Supp. 2d 73 (D.D.C. 2012).
Racial overtones not sufficient for restriction
U.S.—Bond v. Floyd, 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235 (1966).
Racial slurs protected
N.D.—In re A.R., 2010 ND 84, 781 N.W.2d 644 (N.D. 2010).

3 § 953.

4 § 1126.

5 N.Y.—People v. McDowd, 3 Misc. 3d 380, 773 N.Y.S.2d 531 (Sup 2004).
Statute predicated on disorderly conduct
Ill.—People v. Rokicki, 307 Ill. App. 3d 645, 240 Ill. Dec. 852, 718 N.E.2d 333 (2d Dist. 1999).
Not facially invalid
Fla.—Jomolla v. State, 990 So. 2d 1234 (Fla. 3d DCA 2008).
A.L.R. Library
Validity, construction, and effect of "hate crimes" statutes, "ethnic intimidation" statutes, or the like, 22 A.L.R.5th 261.

6 Iowa—State v. Hennings, 791 N.W.2d 828 (Iowa 2010).

7 U.S.—Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).
Va.—Elliott v. Com., 267 Va. 464, 593 S.E.2d 263 (2004).
Cross burning statute facially overbroad
A cross burning statute unconstitutionally infringed free speech by imposing special prohibitions on speakers who expressed views on disfavored subjects of race, color, creed, religion, or gender while permitting

abusive invective not addressed to those topics, thus going beyond content discrimination to actual viewpoint discrimination.

U.S.—R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992).

8 Wash.—State v. Talley, 122 Wash. 2d 192, 858 P.2d 217 (1993).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

20. Copyright, Trademark and Trade Name

§ 1129. Copyright protection and First Amendment rights

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1603

The First Amendment guaranty of free speech and free press does not bar the enactment or application copyright laws or protect copyright infringement; the potential constriction of free speech under the copyright laws is safeguarded by the traditional contours of copyright protection and the fair use doctrine.

While some restriction on expression is the inherent and intended effect of every grant of copyright,[1] the Copyright Act embodies First Amendment protections in its distinction between copyrightable expression and "uncopyrightable" facts and ideas and in the latitude for scholarship and comment safeguarded by the fair use defense.[2] In effect, the traditional contours of copyright protection and the fair use defense are built-in First Amendment accommodations.[3] Given these accommodations, there is generally no requirement for heightened constitutional scrutiny of copyrights as restraints on free expression.[4]

An act extending the copyright term for existing copyrighted works does not violate the First Amendment free speech rights of persons who are utilizing works that have fallen into the public domain when the provision does not alter the traditional contours of copyright protection.[5] The Constitution does not render content in the public domain untouchable by Congress

for purposes of copyright protection, whether measured by the historical record of congressional practice under the Copyright Clause or by the First Amendment.[6]

The First Amendment guaranty of free speech does not protect copyright infringement.[7] Infringing uses of copyrighted material that are not fair uses are rightfully enjoined and the injunction is not an invalid prior restraint under the First Amendment,[8] including the proper grant of a preliminary injunction,[9] but an unwarranted preliminary injunction to prevent copyright infringement is an unlawful prior restraint when the basis for the remedy is not established.[10]

Copyright law does not recognize a First Amendment "chilling effect" defense.[11]

The First Amendment does not protect a right to copyright since one only seeks the protection of copyright voluntarily.[12]

Freedom of press.

The First Amendment guaranty of free press does not permit the press to publish copyrighted materials without obedience to the copyright laws.[13]

CUMULATIVE SUPPLEMENT

Cases:

A State cannot violate the Due Process Clause unless it fails to offer an adequate remedy for a copyright infringement, because such a remedy itself satisfies the demand of due process. U.S. Const. Amend. 14. Allen v. Cooper, 140 S. Ct. 994 (2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Golan v. Holder, 132 S. Ct. 873, 181 L. Ed. 2d 835 (2012).
Potential but necessary constriction of free speech
U.S.—Bouchat v. Baltimore Ravens Ltd. Partnership, 737 F.3d 932 (4th Cir. 2013), as amended on other grounds, (Jan. 14, 2014) and cert. denied, 134 S. Ct. 2319, 189 L. Ed. 2d 177 (2014).

2 U.S.—Golan v. Holder, 132 S. Ct. 873, 181 L. Ed. 2d 835 (2012); Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985); Bouchat v. Baltimore Ravens Ltd. Partnership, 737 F.3d 932 (4th Cir. 2013), as amended on other grounds, (Jan. 14, 2014) and cert. denied, 134 S. Ct. 2319, 189 L. Ed. 2d 177 (2014).
Fair use defense strikes a balance
U.S.—Latimer v. Roaring Toyz, Inc., 601 F.3d 1224, 76 Fed. R. Serv. 3d 739 (11th Cir. 2010).
Merger doctrine strikes a balance
The merger doctrine excludes an idea from the Copyright Act if the idea is susceptible of only one form of expression and thus merges with the expression, balancing the interests of the Act and the First Amendment by permitting free communication while protecting expression.
U.S.—Veeck v. Southern Bldg. Code Congress Intern., Inc., 293 F.3d 791 (5th Cir. 2002).
Act's manufacturing clause upheld
U.S.—Authors League of America, Inc. v. Oman, 790 F.2d 220 (2d Cir. 1986).

3 U.S.—Golan v. Holder, 132 S. Ct. 873, 181 L. Ed. 2d 835 (2012); Eldred v. Ashcroft, 537 U.S. 186, 123 S. Ct. 769, 154 L. Ed. 2d 683 (2003).

4 U.S.—Golan v. Holder, 132 S. Ct. 873, 181 L. Ed. 2d 835 (2012); Eldred v. Ashcroft, 537 U.S. 186, 123 S. Ct. 769, 154 L. Ed. 2d 683 (2003).

5 U.S.—Eldred v. Ashcroft, 537 U.S. 186, 123 S. Ct. 769, 154 L. Ed. 2d 683 (2003).

6 U.S.—Golan v. Holder, 132 S. Ct. 873, 181 L. Ed. 2d 835 (2012).

7 U.S.—Arista Records, LLC v. Doe 3, 604 F.3d 110 (2d Cir. 2010); Hard Drive Productions, Inc. v. Does 1-1,495, 892 F. Supp. 2d 334 (D.D.C. 2012).

8 U.S.—A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001), as amended on other grounds, (Apr. 3, 2001).

9 U.S.—Elvis Presley Enterprises, Inc. v. Passport Video, 349 F.3d 622 (9th Cir. 2003).

10 U.S.—Suntrust Bank v. Houghton Mifflin Co., 252 F.3d 1165 (11th Cir. 2001), opinion issued, 268 F.3d 1257 (11th Cir. 2001).

11 U.S.—Arista Records, Inc. v. Flea World, Inc., 356 F. Supp. 2d 411 (D.N.J. 2005).

12 U.S.—Ladd v. Law & Technology Press, 762 F.2d 809 (9th Cir. 1985).

13 U.S.—Cohen v. Cowles Media Co., 501 U.S. 663, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991).

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16B C.J.S. Constitutional Law § 1130

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

20. Copyright, Trademark and Trade Name

§ 1130. Trademark and trade name protection and First Amendment rights

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1604

The First Amendment guaranty of free speech does limit the application of protection to trademarks and trade names.

The statutory protection afforded trademarks and trade names is subject to limitations under the First Amendment guaranty of free speech as applied to expressive works.[1] The protection of the public's interest in being free from consumer concerns about affiliations and endorsements, provided under the Federal Lanham Act, requires balancing the interest in free expression against the public's interest, such that a statutory limitation will not be applied to expressive works unless the use of the trademark or other identifying material has no artistic relevance to the underlying work whatsoever or, if it has some artistic relevance, unless the use of trademark or other identifying material explicitly misleads as to the source or the content of the work.[2]

The First Amendment protects the use of an expressive commercial product name or description, having at least some artistic relevance, against trademark infringement claims if the usage does not explicitly mislead the public as to the source of the work and if there is no reasonable basis for believing that the public will be misled.[3]

A product challenged as a prohibited mark usage under the Lanham Act is not protected by the First Amendment when it is purely commercial speech, rather than protected artistic expression, looking to considerations of whether the speech is an advertisement, whether it refers to a specific product or service, and whether the speaker has an economic motivation for the speech, all combining to establish that the speech is commercial.[4]

A trademark usage injunction constitutes an invalid prior restraint of protected speech when the order sweeps too broadly and prohibits not only improper usage but also protected communications.[5]

CUMULATIVE SUPPLEMENT

Cases:

Lanham Act's ban on registering trademarks that disparage any person, living or dead, was viewpoint-based and, thus, unconstitutional. U.S. Const. Amend. 1; Lanham Trade-Mark Act § 2, 15 U.S.C.A. § 1052(a). Iancu v. Brunetti, 139 S. Ct. 2294 (2019).

Lanham Act's bar on the registration of immoral or scandalous trademarks discriminates on the basis of viewpoint and, thus, violates the First Amendment; interpreted fairly, the unambiguous language of the statute, on its face, distinguishes between two opposed sets of ideas, namely, those aligned with conventional moral standards and those hostile to them, and those inducing societal nods of approval and those provoking offense and condemnation, favoring the former, but disfavoring the latter, and this facial viewpoint bias results in viewpoint-discriminatory application. U.S. Const. Amend. 1; Lanham Trade-Mark Act § 2, 15 U.S.C.A. § 1052(a). Iancu v. Brunetti, 139 S. Ct. 2294 (2019).

Federally registered trademarks are private speech, not government speech. U.S.C.A. Const.Amend. 1; Lanham Act, § 2, 15 U.S.C.A. § 1052. Matal v. Tam, 137 S. Ct. 1744 (2017).

Assuming that it was appropriate to apply the *Central Hudson* test, for determining whether regulation of commercial speech is valid under the First Amendment, to challenges to provisions of the Lanham Act, the Lanham Act's disparagement clause, prohibiting federal trademark registration for marks that might disparage any persons, living or dead, was not narrowly drawn. (Per Justice Alito, with three Justices concurring and four Justices concurring in the judgment.) U.S.C.A. Const.Amend. 1; Lanham Act, § 2(a), 15 U.S.C.A. § 1052(a). Matal v. Tam, 137 S. Ct. 1744 (2017).

Disparagement clause of Lanham Act, prohibiting federal trademark registration for marks that might disparage any persons, living or dead, was facially invalid under First Amendment protection of speech, as it offended a bedrock First Amendment principle that speech may not be banned on the ground that it expresses ideas that offend. U.S.C.A. Const.Amend. 1; Lanham Act, § 2(a), 15 U.S.C.A. § 1052(a). Matal v. Tam, 137 S. Ct. 1744 (2017).

Trademark registration and the accoutrements of registration, such as the registrant's right to attach the ® symbol to the registered mark, the mark's placement on the Principal Register, and the issuance of a certificate of registration, did not render trademark registration government speech, as would put trademark registration outside the coverage of the First Amendment, where trademark registration was a regulatory activity, registered trademarks were not created, owned, or monopolized by the government, and the public was unlikely to believe that trademark registration constituted government endorsement or conveyed a government message. U.S.C.A. Const.Amend. 1; Lanham Act, § 2(a), 15 U.S.C.A. § 1052(a). In re Tam, 808 F.3d 1321 (Fed. Cir. 2015).

Alleged infringers' hip-hop album Mastermind did not explicitly mislead as to source of the work, as required for trademark protection of owner's Mastermind mark to give way to defendants' expressive speech protected by the First Amendment; every instance where Mastermind was used by defendants, it was accompanied by clear indication that it was associated with defendant

hip-hop artist, while there was insufficient indicating that defendants' use even implicitly suggested that album was associated with plaintiff, as plaintiff merely offered declaration stating that his fans and hip-hop artist's fans started asking him if new album was coming out, misleadingly thinking that defendants' album was his. U.S. Const. Amend. 1. Caiz v. Roberts, 382 F. Supp. 3d 942 (C.D. Cal. 2019).

Use of recording artist's likeness was artistically relevant to advertisement for his former band under *Rogers* test used to determine applicability of Lanham Act provision addressing false designations of origin to expressive works protected by First Amendment; current iteration of band was continuation of original band with another lineup, and artist's likeness was included with other members of band in historic images and album covers documenting history of band. U.S. Const. Amend. 1; Lanham Trade-Mark Act § 43, 15 U.S.C.A. § 1125(a)(1)(A). Chaquico v. Freiberg, 274 F. Supp. 3d 942 (N.D. Cal. 2017).

Use of military supply and outfitting company's angry monkey mark in military warfare video game had some expressive purpose, as required to merit First Amendment protection in company's suit against game's creators and publishers for trademark infringement claims under Lanham Act, where creators of game's multi-player mode aimed to design realistic combat experience, intensity of which was heightened by sophisticated features permitting players to customize their avatars' identities and engage with other players in virtual environment, such as by incorporating, inter alia, patch bearing company's mark, similar to patches available in real world, in order to achieve consistency with this vision. U.S. Const. Amend. 1; Lanham Act, § 1 et seq., 15 U.S.C.A. § 1051 et seq. Mil-Spec Monkey, Inc. v. Activision Blizzard, Inc., 74 F. Supp. 3d 1134 (N.D. Cal. 2014).

Television network's nature documentary titles of Untamed Americas, America the Wild, Surviving Wild America, and America's Wild Frontier, were entitled to First Amendment protection from television program production company's trademark infringement, unfair competition, and deceptive trade practices claims under the Lanham Act, arising from the titles allegedly infringing on production company's Wild America trademark; television network used titles to describe content of its nature documentary programming so that objective inference was strong that motive for titles was genuinely artistic, and nothing suggested television network intended to capitalize on production company's show's popularity, which ceased airing new episodes decades earlier. U.S. Const. Amend. 1; Lanham Trade-Mark Act, § 1 et seq., 15 U.S.C.A. § 1051 et seq. Stouffer v. National Geographic Partners, LLC, 460 F. Supp. 3d 1133 (D. Colo. 2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Brown v. Electronic Arts, Inc., 724 F.3d 1235 (9th Cir. 2013); University of Alabama Bd. of Trustees v. New Life Art, Inc., 683 F.3d 1266 (11th Cir. 2012).
Mark with common meaning not protected
U.S.—Mattel, Inc. v. Walking Mountain Productions, 353 F.3d 792 (9th Cir. 2003).

2 U.S.—Brown v. Electronic Arts, Inc., 724 F.3d 1235 (9th Cir. 2013).
Balancing of interests required
U.S.—University of Alabama Bd. of Trustees v. New Life Art, Inc., 683 F.3d 1266 (11th Cir. 2012).
Consumer confusion is distinct issue
The question of consumer confusion, as a basis for a violation of the Lanham Act, is a distinct question from First Amendment protection as artistic expression.
U.S.—Facenda v. N.F.L. Films, Inc., 542 F.3d 1007 (3d Cir. 2008); Davis v. Walt Disney Co., 430 F.3d 901 (8th Cir. 2005).

3 U.S.—E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc., 547 F.3d 1095 (9th Cir. 2008).

4 U.S.—Facenda v. N.F.L. Films, Inc., 542 F.3d 1007 (3d Cir. 2008).

5 U.S.—Test Masters Educational Services, Inc. v. Singh, 428 F.3d 559 (5th Cir. 2005).
Trademark injunction involving fair use

A trademark injunction involving a nominative fair use must be tailored to eliminate only the specific harm alleged if it is to avoid interfering with free speech.
U.S.—Toyota Motor Sales, U.S.A., Inc. v. Tabari, 610 F.3d 1171 (9th Cir. 2010).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

21. Other Particular Matters

§ 1131. United States postal power; First Amendment right to use of mail

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1573

The First Amendment guaranty of free speech applies to written materials sent through the United States mail as much as to verbal communications; the use of the United States mail is a protected medium of free speech and may not be abridged by the government's postal power.

The First Amendment guaranty of free speech applies to written materials sent through the United States mail as much as it does to verbal communications.[1] The right to send and receive mail is protected under the First Amendment as a medium of free speech[2] and is protected as well under the First Amendment guaranty of free press.[3] Restrictions on the mail system implicate the First Amendment,[4] and a regular and unjustifiable interference with legal mail is a First Amendment violation.[5] In determining an interference with the exercise of a First Amendment right—as in the context of mail receipt and posting—a court's inquiry consists of the traditional forum analysis, applying the appropriate level of scrutiny dictated by the nature of the forum.[6]

The postal power conferred by the United States Constitution may not be exercised by Congress in a manner that abridges freedom of speech and press,[7] but content neutral postal charges for mailing services do not violate the First Amendment.[8]

Statutes which proscribe the unsolicited mailing of information concerning abortion and contraceptive advertisements may be unconstitutional.[9]

First Amendment rights are not infringed by denying mailing privileges to pandering advertisements,[10] eligibility requirements for subsidized second-class mailing privileges,[11] prohibiting the deposit of unstamped "mailable" matter in a postal service letterbox,[12] permitting customs searches of incoming mail at the border under reasonable cause to suspect contraband,[13] or denying the use of postal facilities to defraud.[14]

Statutes designed to deny the use of the mails to commercial distributors of obscene literature violate the First Amendment unless they include built-in safeguards against curtailment of constitutionally protected expression.[15]

Footnotes

1 U.S.—Blount v. Rizzi, 400 U.S. 410, 91 S. Ct. 423, 27 L. Ed. 2d 498 (1971); Government of Virgin Islands v. Vanterpool, 767 F.3d 157 (3d Cir. 2014).

2 U.S.—Currier v. Potter, 379 F.3d 716 (9th Cir. 2004); Al-Amin v. Smith, 511 F.3d 1317 (11th Cir. 2008); Murphy v. Lockhart, 826 F. Supp. 2d 1016 (E.D. Mich. 2011), amended in part on other grounds, (Oct. 14, 2011).

3 U.S.—Reporters Committee for Freedom of Press v. American Tel. & Tel. Co., 593 F.2d 1030 (D.C. Cir. 1978).

4 U.S.—Currier v. Potter, 379 F.3d 716 (9th Cir. 2004).

5 U.S.—Ahlers v. Rabinowitz, 684 F.3d 53 (2d Cir. 2012).

6 U.S.—Currier v. Potter, 379 F.3d 716 (9th Cir. 2004).

7 U.S.—U. S. Postal Service v. Council of Greenburgh Civic Associations, 453 U.S. 114, 101 S. Ct. 2676, 69 L. Ed. 2d 517 (1981).

8 U.S.—The Enterprise, Inc. v. U.S., 833 F.2d 1216 (6th Cir. 1987).

9 U.S.—Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983).

10 U.S.—U.S. v. Pent-R-Books, Inc., 538 F.2d 519, 1 Fed. R. Evid. Serv. 259 (2d Cir. 1976).

11 U.S.—The Enterprise, Inc. v. U.S., 833 F.2d 1216 (6th Cir. 1987).

12 U.S.—U. S. Postal Service v. Council of Greenburgh Civic Associations, 453 U.S. 114, 101 S. Ct. 2676, 69 L. Ed. 2d 517 (1981).

13 U.S.—U.S. v. Ramsey, 431 U.S. 606, 97 S. Ct. 1972, 52 L. Ed. 2d 617 (1977).

14 U.S.—U.S. v. Meredith, 685 F.3d 814 (9th Cir. 2012), for additional opinion, see, 485 Fed. Appx. 185 (9th Cir. 2012).

15 U.S.—Blount v. Rizzi, 400 U.S. 410, 91 S. Ct. 423, 27 L. Ed. 2d 498 (1971).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

21. Other Particular Matters

§ 1132. Applicability of First Amendment to flag display or desecration

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1671, 1866

The First Amendment guaranty of free speech protects the display and the desecration of the United States flag or a state flag as an action of speech and symbolic expression.

The First Amendment guaranty of free speech protects the display of the United States flag as speech and expression[1] and protects the desecration of the United States flag as speech and expression.[2] Protection applies whether the desecration is by flag-burning[3] or other use, mutilation, or alteration of the flag.[4]

First amendment free speech rights are not violated by charges of attempting to destroy government property by fire in connection an attempt to burn a government-owned flag at a military recruiting station, absent a showing that the defendants are prosecuted because the case involved flag burning.[5]

Footnotes

1 U.S.—Brown v. California Dept. of Transp., 260 F. Supp. 2d 959 (N.D. Cal. 2003); Young v. City of Roseville, 78 F. Supp. 2d 970 (D. Minn. 1999).
As to laws regulating flags, generally, see C.J.S., Flags §§ 1 to 4.
Display in private home
Pa.—Com. v. Bricker, 542 Pa. 234, 666 A.2d 257 (1995).
Upside down display
U.S.—Congine v. Village of Crivitz, 947 F. Supp. 2d 963 (E.D. Wis. 2013).

2 U.S.—Snider v. City of Cape Girardeau, 752 F.3d 1149 (8th Cir. 2014); Valle Del Sol Inc. v. Whiting, 709 F.3d 808 (9th Cir. 2013).

3 U.S.—U.S. v. Eichman, 496 U.S. 310, 110 S. Ct. 2404, 110 L. Ed. 2d 287 (1990); Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989); Valle Del Sol Inc. v. Whiting, 709 F.3d 808 (9th Cir. 2013).
Tex.—State v. Johnson, 425 S.W.3d 542 (Tex. App. Tyler 2014), petition for discretionary review granted, (Apr. 9, 2014).

4 U.S.—Snider v. City of Cape Girardeau, 752 F.3d 1149 (8th Cir. 2014); Phelps v. Powers, 2014 WL 6865736 (S.D. Iowa 2014).
Wearing flag
U.S.—Dunn v. Carroll, 40 F.3d 287 (8th Cir. 1994).

5 U.S.—U.S. v. Eichman, 957 F.2d 45 (2d Cir. 1992).

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PART IV. First Amendment Rights; Speech, Petition, Religion, and Association

XI. Freedom of Speech and of the Press

B. Particular Speech or Expression; Regulation or Restriction

21. Other Particular Matters

§ 1133. First Amendment protection of crime-related revenue from publication or discussion

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1817

The First Amendment guaranty of free speech protects profits associated with discussions of a criminal's crimes from overbroad speech restrictions but the protection is subject to narrowly drawn restrictions serving sufficient government interests.

A "Son of Sam" law, allowing a felony victim to recover from the felon any monetary proceeds the felon might generate from published materials based on or substantially related to the offense, while serving a compelling state interest in the compensation of crime victims and in the prevention of direct profiteering from criminal misconduct, is invalid under the First Amendment guaranty of free speech when it is overly inclusive as applied to any works on the subject that express the author's thoughts or recollections about the author's crime, however tangentially or incidentally.[1] When compensating the victims of a crime, it is presumptively unconstitutional under the First Amendment to target the profits associated with publications describing the crime.[2]

Civil forfeiture.

A state civil forfeiture law, as applied to the proceeds of a convicted criminal's published accounts of criminal racketeering activity, based on the law's expressed objective to capture "any interest in property of any kind acquired through or caused by an act or omission, or derived from the act or omission, directly or indirectly, and any fruits of this interest, in whatever form," is a valid content-neutral provision within the constraints of the First Amendment guaranty of free speech, based solely on the existence of a causal connection between the crime of racketeering and property.[3] The statute meets the test of strict scrutiny for a compelling government interest in ensuring that criminals do not profit from their crimes and is narrowly drawn to achieve that end because it is based on a causal connection of the property with the specific crime rather than a mere mention of a crime in an expressive work.[4]

Footnotes

1 U.S.—Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991).
Over-inclusive content-based restriction on speech
Cal.—Keenan v. Superior Court of Los Angeles County, 27 Cal. 4th 413, 117 Cal. Rptr. 2d 1, 40 P.3d 718 (2002).
Nev.—Seres v. Lerner, 120 Nev. 928, 102 P.3d 91 (2004).
A.L.R. Library
Validity, construction, and application of "Son of Sam" laws regulating or prohibiting distribution of crime-related book, film, of comparable revenues to criminals, 60 A.L.R.4th 1210.

2 U.S.—Bray v. Planned Parenthood Columbia-Willamette Inc., 746 F.3d 229 (6th Cir. 2014).

3 Ariz.—State ex rel. Napolitano v. Gravano, 204 Ariz. 106, 60 P.3d 246 (Ct. App. Div. 1 2002).

4 Ariz.—State ex rel. Napolitano v. Gravano, 204 Ariz. 106, 60 P.3d 246 (Ct. App. Div. 1 2002).

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